PD-ABQ-090
96314

NOTE

JUN 27 1994

TO: AA/M, Phyllis Dichter-Forbes
Rm. 3932NS

FROM: GC, Wandra Mitchell

The attached memorandum reviews the legal issues raised by the Reengineering Report in the areas of obligation and procurement, issues which will undoubtedly arise both on the Congressional and GAO/IG/contract protest levels. It makes suggestions on possible models for obligation by strategic objective, which are not intended to be exclusive. There may be variations or different approaches which should be considered in light of the legal parameters that are discussed.

The memorandum concludes that not all of the Report's proposed improvements to the procurement system, as presently articulated, appear to be achievable under existing law and regulations. However, it does note certain ideas and work underway in the area of performance-based contracting which should prove helpful, with further development. Further approaches may be possible to overcome these apparent hurdles.

We look forward to playing a helpful role and to working closely with the Reengineering Group, the Administrator's Office, the M Bureau, PPC and others in putting into place an effective and durable reengineered system.

Please let me know if you would like to discuss any aspect of this work.

Attachment

cc:w/Attachment

DA/AID, Carol Lancaster
AA/M, Larry Byrne
C/AID, Kelly Kammerer
AA/POL, Terry Brown
A/AID, Jennifer Windsor

EXECUTIVE SUMMARY

REENGINEERING
LEGAL REQUIREMENTS RELATING TO OBLIGATIONS, PLANS AND COST ESTIMATES, PROCUREMENT, AND USES OF USAID FUNDS

I. THE ISSUE

A fundamental precept of the Reengineering Proposal is to obligate funds by strategic objective, in order to shift the USAID focus from inputs to outcomes (results) and retain greater flexibility in shifting funds to meet the broadly-stated objectives. Legal requirements relating to the obligation of appropriated funds and to the completion of plans and cost estimates for USAID funding, however, for the most part contemplate systems and mechanisms that look at inputs, not results. The issue, therefore, is whether and how obligations at the strategic objective level, which by definition look at broadly-stated outcomes and results, can fulfill the legal requirements for planning and obligations. The adequacy of the obligation by objective approach will be of obvious interest and concern to the Congress. We shall have to meet the burden of assuring that body that the new approach will not eliminate the knowledge and control necessary for it to act favorably on our appropriations requests.

II. CONCLUSION

Within the relatively broad parameters discussed below, which necessarily must be applied on a case-by-case basis, we believe it is possible to obligate by strategic objective in grant agreements generally along the lines described in the Reengineering Proposal. Use of contract obligations to define and achieve strategic objectives will be more problematic, but may have application in some circumstances. More work in applying the legal concepts and requirements described in Section II of this Memorandum will be required as the structure and details of the reengineered operational system are developed further.

The Reengineering Proposal also makes a number of recommendations in procurement and contracting. Some of the recommendations, such as prequalification, "de-linearizing", and performance-based contracting, raise legal issues which are discussed in this memorandum. W discuss several other statutory restrictions that are of less concern. The proposed procurement changes are more apt to be tested on the IG-GAO audit or contract dispute resolution levels, and if not adquately structured to meet applicable legal considerations, could be found wanting.

III. OBLIGATION AND PLANNING

This memorandum reviews:

(i) the legal concept of obligation,

(ii) the requirement for planning prior to obligation, and

(iii) some past instances in which USAID has obligated funds for sectoral or other broad purposes.

It then discusses issues raised by the proposed reengineered system and suggests several models, based on an analysis of the law and prior applications, which we believe can be useful in achieving the goals of the Reengineering Proposal.

- There are two principal statutes which apply. One, Sec. 1501 of Title 31 of the United States Code, concerns the level of agreement specificity required to obligate USAID program funds. The other, Section 611(a) of our own Foreign Assistance Act concerns required pre-obligation planning.

1) "Obligation" is an important concept in federal appropriations law. While there is no all inclusive definition of "obligation", its essence is a firm, legally-binding agreement that commits the United States to expend appropriated funds by virtue of actions that can be taken by the other party or parties to the agreement beyond the control of the United States. The basic requirements for different types of obligation (grants, contracts, loans) are stated in 31 USC 1501. Under the reengineered system, most of USAID's program is expected to be obligated through grants. In general, the terms of a contract must be more "definite and specific" than the terms of a grant to be a valid obligation.

2) Section 611(a) of the Foreign Assistance Act of 1961, as amended ("FAA"). Pursuant to Section 611(a), appropriate planning must be accomplished prior to obligation. While Section 611(a) may be deleted in the proposed revision of the FAA, the requirements for obligation (Section 1501) also imply that some level of advance planning is needed in order to be able to state in a grant or contract the basic terms to which the parties have agreed. There is no precise "legal" guidance that can be given on the kind or amount of planning that is adequate to satisfy the requirements of Section 611(a). In developing agreements which obligate by strategic objective, however, we believe that in most cases considerable planning prior to obligation will be required.

- USAID Past Applications. In the past, USAID has developed a variety of projects and programs which obligate funds for broad purposes. This memorandum discusses three models that are potentially applicable to obligating by bilateral grant agreement for strategic objectives as recommended in the Proposal.

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1. An incrementally funded, umbrella grant, with a broadly-framed purpose and measurable results and an analytical framework that describes the interventions necessary to accomplish the results could be utilized. In this model, "subactivities" or "subprojects" within the scope of the project's purposes are obligated either at the time the agreement is signed (if planned and ready) or by amendment to the umbrella agreement following appropriate planning. Section 611(a) is complied with through appropriate planning for the subactivity prior to the actual obligation; Section 1501 is complied with by obligating for specific activities in a binding, firm, and unconditional commitment. Flexibility is retained by obligating within the scope of the umbrella agreement, which permits adjustments in funding levels for subactivities within criteria stated in the project agreement, without violating the essential commitment of the funds to the recipient.

2. A grant agreement with criteria and procedures for subactivity selection and a list of illustrative, preliminarily costed subactivities, in which the full amount allocated for the strategic objective could be obligated if sufficient planning has been done. In this model, funds are obligated for a broad, but defined purpose, with measurable results and analytical framework to show how implementation will lead to accomplishment of the results. The keys to this model are actual or illustrative "subactivities" or "subprojects", with indicative funding levels, specified in the grant agreement and objective criteria for selecting, judging, and approving the subactivities. Section 611(a) is complied with through appropriate technical and financial planning for the indicative or illustrative projects as well as institutional and process planning. Section 1501 is complied with by transferring control over draw-downs to the recipient, so long as they are within both the broad objectives and the objective criteria and conditions stated in the agreement.

3. An institution building model, such as the Oman Joint Commission or some ICI grants, could be used. They comply with Section 611(a) by planning for the institutional and administrative processes involved. They comply with Section 1501 by unconditionally transferring control over draw-downs to the recipient, so long as they are within the objective criteria and conditions in the agreement.

IV. PROCUREMENT

The Reengineering Proposal identifies a number of changes intended to "make procurement faster, simpler, more responsive to the needs of the field, and more performance-oriented." Three of the proposed changes, prequalification, delinearized procurement and performance-based contracting raise issues for discussion.

- The prequalification of firms is proposed as a means of shortening the

procurement process. The use of prequalification is codified at 41 USC 253c, and included in the Federal Acquisition Regulation ("FAR"), which governs all USAID direct procurements. The relevant FAR provisions dictate that prequalification is to be used for quality assurance reasons and not to compress the procurement cycles or to narrow the universe of preferred contractors to a "short list" to the exclusion of other capable offerors. Rather, they are intended to encourage new competition. Thus, under existing law and regulation, the use of prequalification to support the objectives of the Reengineering Proposal as presently conceived, appears to present a problem.

- "Delinearized" procurement is proposed. While USAID can take certain steps to compress the design process, we believe that design and procurement fundamentally are sequential steps. Under existing law, USAID is obliged to secure full and open competition (except in certain specified circumstances). To do this, contracts must be awarded on the basis of common, unambiguous specifications -- which depend on adequate design work before the issuance of RFPs.

- Performance-based contracting is also recommended. We would note that this mode of contracting already is approved USG policy, and should be employed by USAID where feasible. However, many USAID procurement actions will not lend themselves easily to this approach, either because the results which are sought are subject to factors beyond the control of the contractor, or are not easily measurable. On the other hand, as USAID continues to develop a results-oriented system, more opportunities to incorporate appropriate performance benchmarks into contracts should evolve. Also, other steps to encourage performance may be helpful. A system to make the past performance of contractors a significant evaluation factor is now under consideration. Also, consideration of the inclusion of incentive awards in contracts may be appropriate in some circumstances.

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This memorandum presents the basic legal requirements and applies them to the Reengineering Proposal as it had evolved through March. While this memorandum attempts to suggest possible approaches for achieving the objectives of the Reengineering Proposal within legal constraints, it does not attempt to design operational methods, mechanisms or procedures to re-craft the Reengineering Proposal from the legal perspective. We look forward, however, to discussing these matters with the Reengineering Reference Group and others in USAID, and to working together to further develop a reengineered, results-oriented operational system.

REENGINEERING
LEGAL REQUIREMENTS RELATING TO OBLIGATIONS, PLANS AND COST ESTIMATES, PROCUREMENT, AND USES OF USAID FUNDS

I. THE ISSUE

The draft report entitled "Results-Oriented Operations Reengineering" (hereinafter the "Reengineering Proposal")[1] calls for obligating funds by strategic objective. The reasons for doing so relate to the desire to define outcomes (results) rather than inputs and to have greater flexibility in shifting funds to meet the broad objectives.

Government-wide and USAID-specific laws and regulations prescribing requirements for planning and estimating costs for the use of federal funds, obligating them, and making expenditures to procure goods and services for the most part contemplate systems and mechanisms that look at inputs, not results. In essence, the law requires that if an agreement or grant requires substantive technical or financial planning it must be done prior to obligation, and in every case there must be a binding agreement, in writing, for something specific and definite, that commits the United States to expend funds. The issue is whether and how obligations at the strategic objective level, which by definition look at broadly-stated outcomes and results, can comply with the legal requirements for planning and obligations.

In addition to issues related to obligations and pre-obligation planning, there are two other categories of legal issues. The first encompasses issues raised by procurement proposals such as prequalification, "de-linearizing", and performance-based contracting. The second category includes the various limitations on the use of USAID funds such as "Bumpers" (agricultural products), "Lautenberg" (textiles), and "Section 599" (export of jobs). This latter category raises the least difficult issues because the strictures generally relate either to a country's eligibility for assistance or to the purposes for which funds may be spent and can be handled, if necessary, through conditions in agreements.

This memorandum will present the basic legal requirements on obligations and planning, examine past and current Agency practices, especially with respect to "umbrella" projects, non-project assistance, and similar mechanisms aimed at flexible sector funding, and consider options for achieving obligation by strategic objective and other reengineering proposals within the constraints of the law. The memorandum also will discuss issues raised by the procurement process changes recommended by the

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[1] This memorandum is based on the 3/31/94 draft report. We understand that subsequent drafts have been prepared, but that they have not substantially revised the 3/31/94 draft.

Reengineering Proposal, and will touch very briefly on the other statutory limitations which apply to the foreign assistance program.

II. OBLIGATION AND PLANNING

A. The Reengineering Proposal -- Obligation by Strategic Objective

The process begins by setting program parameters, which consider Congressional mandates, special interest concerns, USAID's strategic objectives, and proposed regional and central bureau programs. Within these parameters, Missions (in close coordination with USAID/W) are responsible for preparing a comprehensive country strategic performance plan ("strategic plan"). The strategic plan has three parts: a strategic definition of the program, which will identify the key strategic objectives on which the Missions will focus, a report on progress made towards program outcomes and strategic objectives, and an operational resources plan, which will provide program details and resource requirements for the current and next one or two fiscal years. The strategic plan will be approved by USAID/W. Fund allocations for achieving the approved strategy -- objectives and outcomes, will be done on an annual or every two year basis. The Strategic Plan, once approved, will represent a "performance contract" between Washington and the Mission.

The reengineering proposal then envisions obligating at the strategic objective level early in the fiscal year. "The intent is to obligate at a higher, more aggregated level than the current Project or Program Agreement would permit." The idea is to define outcome rather than input as the basis for allocating funds, to provide greater flexibility to shift resources between activities supporting a strategic objective, and to facilitate agreement with the host country on the overall strategy and objectives. The Reengineering Proposal favors agreements with the host country but recognizes that some obligations may be by grants to NGOs, or possibly by contracts.

Two statutory provisions directly affect the proposal to obligate by specific objective:

- 31 USC 1501, "Documentary Evidence Requirement for Government Obligations" ("Section 1501"). Section 1501 sets forth the criteria which must be met in order to record an obligation of USG appropriated funds. The key concept is that any agreement which purports to obligate USG funds must evidence a firm, legally binding commitment on the part of the USG, and cannot merely be an "agreement to agree".

- Section 611(a) of the Foreign Assistance Act of 1961, as amended, ("Section 611(a)" and "FAA"). Section 611(a) provides that no agreement which constitutes an obligation under 31 USC 1501 shall be made if such agreement requires substantive planning, until the necessary plans and a reasonably firm cost estimate to the USG of providing the assistance have been completed. (The Administration's proposed revision of the FAA would eliminate Section 611(a)).

Both Section 1501 and Section 611 state their requirements in general terms, and do not lend themselves to clear, categorical distinctions between actions which are legally permissible and those which are not. (A copy of each section is attached as Appendix 1.) Rather, a case-by-case approach is called for. As described in Section II E, below, we believe it is possible to obligate assistance funds by strategic objective along lines similar to those generally described in the Reengineering Proposal. However, further work will be required to develop this operational approach in view of the concepts embodied in Sections 1501 and 611(a).

B. Section 1501

Originally enacted as Section 1311 of the Supplemental Appropriations Act of 1955, Section 1501's purpose is to prevent excessive or inappropriate spending by Executive Branch officials. Thus, the 1954 House Report regarding Section 1311 states in pertinent part:

> "Over a period of years numerous loose practices in handling appropriated funds have grown up in various agencies of the government. The most difficult problem in this area arises from the recording of various types of transactions as obligations of the government when, in fact, no real obligation exists. This situation has become so acute as to make it next to impossible for the Committee on Appropriations to determine with any degree of accuracy the amount which has been obligated against outstanding appropriations as a basis for determining future requirements. It has become necessary to set forth definitively in the law the types of transactions which will be recognized as true obligations and secure accurate reporting thereon in order that it may be possible for the Committee on Appropriations to have a sound basis for its operations. Section 1311 therefore has been included in the bill to accomplish this purpose."[2] (emphasis added)

The issue of whether an "obligation" has occurred is important in Federal appropriations law for the purpose of determining when appropriated funds are committed to their statutory purposes -- when an obligation is recorded against a fiscal year appropriation. The General Accounting Office (GAO) notes that both over-recording and under-recording obligations are improper:

> "Over-recording (recording as obligations items which are not) usually is done to prevent appropriations from expiring at the end of a fiscal year. Under-recording (failing to record legitimate obligations) makes it impossible to determine the precise status of the appropriation and may

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[2] H. Rep. No. 226, 83rd cong., 2d Sess. 49-50 (1954).

result in violating the Antideficiency Act."[3]

The purpose of Section 1501 is to "ensure that agencies record only those transactions which meet specified standards for legitimate obligations."[4] However, the GAO has not formulated an all-inclusive definition of the term "obligation", noting that to do so would be "impracticable if not impossible".[5] Instead, the GAO has defined "obligation" only in the most general terms, as

> "a definite commitment which creates a legal liability of the government for the payment of appropriated funds for goods and services ordered and received,"[6] and
>
> "some action that creates a liability or definite commitment on the part of the government to make disbursement at some later time."[7]

It is the binding nature of the commitment, and the shifting of control over the exercise of that commitment, that lies at the essence of the obligation concept. Thus, in a published case, the Comptroller General said:

> "If such analysis discloses a legal duty on the part of the United States which constitutes a legal liability or which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States, an obligation of funds may generally be stated to exist."[8] (emphasis added)

Section 1501 provides for the recording of obligations and states general criteria for nine different modes of obligation. The GAO has commented that these nine criteria "taken together might be said to comprise the 'definition' of an obligation." Because of the immense variety of transactions in which the government is involved, the concept of "obligation" is necessarily applied to individual transactions on a case-by-case basis. USAID's efforts to obligate funds by strategic objective will need to be mindful

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[3] United States General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, 2nd Ed., Dec. 1992, (hereinafter, "GAO Red Book"), p. 7-5.

[4] Id. at 7-6.

[5] Id. at 7-3.

[6] Id.

[7] Id. at 7-4.

[8] 42 Comp. Gen. 733, 734 (1962).

both of the general GAO definitions of obligation noted above and the specific provisions of Section 1501 concerning grants, contracts and loans, which are discussed in the following sections.

1. Grants

At present, the bulk of USAID funds are obligated by grant agreements and the Reengineering Proposal presumes that, for obligation by strategic objective, "a host country agreement is preferable in terms of flexibility in varying the activity mix, gaining consensus and promoting better participation." Concerning grants, Section 1501(a)(5) provides as follows:

> "(a) An amount shall be supported as an obligation of the United States Government only when supported by documentary evidence of-
> * * * *
> (5) a grant or subsidy payable-
> (A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law;
> (B) under an agreement authorized by law; or
> (C) under plans approved consistent with or authorized by law;".

While the GAO has not prescribed specific terms which must be included in a grant agreement in order to effect an obligation under Section 1501 (a)(5), it has identified four requirements which must be met:

- There must be some action to establish a firm commitment on the part of the United States;
- The commitment must be unconditional on the part of the United States;
- There must be documentary evidence of the commitment; and
- The award terms must be communicated to the official grantee, and where the grantee is required to comply with certain prerequisites, such as putting up matching funds, the award must also be accepted by the grantee during the period of availability of the grant funds.[9]

Thus, a USAID grant agreement which purports to obligate by strategic objective must evidence the firm, unconditional commitment of USAID to grant funds to the grantee for agreed purposes, the terms which the grantee must comply with, and the grantee's acceptance of such terms.

The most problematic of these general requirements is the identification and

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[9] GAO Redbook at 7-33.

acceptance by the grantee of the terms of the grant, in particular the "prerequisites" or conditions precedent with which the grantee is required to comply in order for the grant to be disbursed. Certainly USAID can make a valid obligation of grant funds with only minimal or perfunctory conditions precedent to disbursement which the grantee must satisfy. Said another way, USAID can sign a grant agreement which evidences the firm, unconditional commitment of USAID to grant funds to a grantee for an agreed purpose with virtually "no strings attached". Some cash transfer grant agreements are in this category.

But in most instances USAID intends that it will retain and exercise some degree of continuing control over the use of grant funds, such as with regard to the planning and design of activities or the procurement of the goods and services needed for implementation. In these situations, therefore, it is necessary for the grant document to specify what steps the grantee must take in order to cause a disbursement of the grant funds and the terms which will apply to the eventual use of the grant funds by the grantee or for the grantee's benefit. The typical USAID project grant agreement is structured to do this. Although various implementation details remain to be worked out and implementation experience may lead to changes in the approach taken to achieve the grant purpose, the project grant agreement should be clear as to the basic approach to be taken and what the grantee must do in order to cause grant funds to be expended.

Most likely in recognition of the conceptual differences between grants and contracts and the differing purposes they are intended to serve, the terms of a grant need not be as specific as the terms of a contract, in order to constitute a valid obligation under Section 1501. (Contract obligations are discussed in the following section.) Yet, the requirement that a grant constitute a firm, unconditional commitment to the grantee will require that its basic terms be specific. Thus, a grant agreement which conditions disbursement on the grantee's compliance with various specific requirements can be considered to be a firm, unconditional commitment by the USG because the grantee can ascertain from the agreement what it must do in order to cause the grant funds to be utilized, as well as other terms which apply to the use of the funds.

However, if essential terms remain to be agreed upon and USAID retains the right to withhold the disbursement of funds until such terms are resolved to USAID's satisfaction, the characterization of the grant as a "firm commitment" and "unconditional" on the part of USAID may be called into question. If the requirements which must be met are too vague and undeveloped to permit the grantee to understand the basic steps and limitations which will be required of it, the agreement may not support a recordable obligation. While the standard applicable to grants is more flexible than the one which applies to contracts, a grant agreement which is so indefinite and unspecific in its basic terms and approach that it risks characterization as a mere "agreement to agree" will not likely constitute a valid obligation of appropriated funds.

To be able to validly obligate assistance funds at the strategic objective level, the grant agreement would have to set forth the basic approach and essential terms which govern the bilateral endeavor. To do this, appropriate advance planning and cooperation with the recipient would be required. It appears that the Reengineering Proposal contemplates considerable planning and consultation in the development, implementation and evaluation of strategic programs. Thus, as described in II E, below, we believe the Reengineering Proposal provides a framework for obligating grants at the strategic objective level.

2. Contracts

The Reengineering Proposal states that there may be circumstances in which a strategic objective obligation is accomplished by means of a contract. On contracts, Section 1501 (a)(1) provides as follows:

> "(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of-
>
> (1) a binding agreement between an agency and another person (including an agency) that is-
>
> (A) in writing, in a way and form, and for a purpose authorized by law; and
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> (B) executed before the end of the period of availability of the appropriation or fund used for specific goods to be delivered real property to be bought or leased, or work or service to be provided;" (emphasis added).

The subsection states five requirements to record an obligation for a contract. The contract must be (1) a binding agreement; (2) in writing; (3) for a purpose authorized by law; (4) executed during the period of obligational availability; and (5) for specific goods or services. The last of these requirements, not found in the subsections of Section 1501 for grants or loans, may raise particular difficulties if the Agency seeks to use contracts as the obligating document for strategic objectives.

An agreement which is not sufficiently specific is not a valid obligation. For instance, a contract awarded by the Department of State under the Migration and Refugee Assistance program which established a contingency fund to provides funds for refugee assistance by any means, organization or other voluntary agency as determined by the Supervising Officer did not meet the requirement of specificity and therefore was not a valid obligation.[10] Similarly, a purchase order for "regulatory, warning and guide signs based on information supplied" on requisitions to be issued did not validly obligate funds where the requisitions were not sent to the supplier until after the close of the

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[10] Id. at 7-14.

fiscal year.[11]

The specificity requirement also must be met in variable quantity contracts, e.g., requirements contracts and indefinite quantity contracts (IQCs). A requirements contract is one in which the government agrees to purchase all of its needs for specified goods or services during a specified period from the contractor, and the contractor agrees to fill all such needs. The government must state a realistic estimate of its total anticipated requirements based on currently available information. A minimum purchase amount may be included but is not required. If it turns out that the anticipated requirements are not needed by the government, it is not required to purchase the stated estimate. An IQC is a contract in which the contractor agrees to supply whatever quantity of goods or services the government may order, within limits, with the government under no obligation to use that contractor for all of its requirements. Under current regulations, an IQC must include a minimum purchase requirement which must be more than nominal. 48 C.F.R. 16.504(a).

Concerning requirements contracts and IQCs, the GAO comments:

> "What does all this signify from the perspective of obligating appropriations?
> . . . The obligational impact of a variable quantity contract depends on exactly what the contractor has bound itself to do. A fairly simple generalization can be deduced from the decisions: In a variable quantity contract (requirements or indefinite-quantity), any required minimum purchase must be obligated when the contract is executed; subsequent obligations occur as work orders or delivery orders are placed, and are chargeable to the fiscal year in which the order is placed." (Emphasis added.)[12]

While this requirement by itself does not preclude a contract obligation by strategic objective, it does limit USAID's ability to obligate the entire amount of funds for a particular strategic objective at one time early in the fiscal year.

Finally, the GAO attempts to distinguish among the various types of administrative approvals that affect whether funds are truly obligated. USAID traditionally, of course, reserves a variety of approval rights in contracts. GAO observes that approvals that determine whether the Government accepts the charge or liability are so fundamental that no obligation occurs until the approval is given. On the other hand, approvals "intended only to insure the reasonableness of the expenses incurred" are

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[11] Id. at 7-14, B-196109, October 23, 1979.

[12] Id. at 7-15.

administrative only and the full obligation occurs at the time of contracting -- even though the exact amount may not be known until the approval is given.[13]

3. Loans

At present, USAID does not enter into loan obligations. However, with credit reform, a loan program may again be a possibility in the future. Regarding loans, Section 1501(a)(2) provides:

> "(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of-
> * * * *
> (2) a loan agreement showing the amount and terms of repayment;".

Although the loan section does not include language on the specificity of goods and services, the Red Book emphasizes that to "support a recordable obligation under subsection (a)(2), the agreement must be sufficiently definite and specific, just as in the case of subsection (a)(1) obligations." As an illustration, they cite from what appears to be an unpublished office memorandum regarding a USAID loan:

> "To illustrate, the United States and the government of Brazil entered into a loan agreement in 1964. As a condition precedent to any disbursement under the agreement, Brazil was to furnish a statement covering the utilization of the funds. The funds were to be used for various economic and social development projects, 'as may, from time to time, be agreed upon in writing' by the government of the United States and Brazil. While the loan agreement constituted a valid binding contract, it was not sufficiently definite or specific to validly obligate FY 1964 funds. The basic agreement was little more than an 'agreement to agree,' and an obligation of funds could arise only when a particular 'utilization statement' was submitted and approved."[14]

Although the foregoing summary of conclusions arose from a case involving a loan, it is clear from GAO sources that the principle applies equally to grants and contracts. Thus, to be a valid obligation, the agreement between the parties must be more than an "agreement to agree".

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[13] 1982 Red Book at 6-15.

[14] GAO Red Book at 7-28, citing B-155708-O.M., April 26, 1965.

C. FAA Section 611(a)

Section 1501, by requiring that agreements require some level of specificity (depending on the type and purposes of the agreement), also implies that appropriate planning must take place before obligation to develop the basic terms of an agreement. In the case of foreign aid, however, Congress clearly found that this general requirement was not sufficient to generate the kind and level of planning it deemed necessary. FAA Section 611(a), therefore, goes further and makes prior planning, where required, a prerequisite to obligation of assistance funds.

Section 611(a) is the successor to Section 517(a) of the Mutual Security Act of 1954, as amended (MSA), originally enacted in 1958. Section 611(a), identical to Section 517(a) except for the threshold amount and section references, reads as follows:

> "(a) No agreement or grant which constitutes an obligation of the United States Government in excess of $500,000 under section 1501 of title 31, United States Code, shall be made for any assistance authorized under chapter I of part I, title II of chapter 2 of part I, or chapter 4 of part II -
>
> (1) if such agreement or grant requires substantive technical or financial planning, until engineering, financial, and other plans necessary to carry out such assistance, and a reasonable firm estimate of the cost to the United States Government of providing such assistance, have been completed; and
> (2) if such agreement or grant requires legislative action within the recipient country, unless such legislative action may reasonably be anticipated to be completed in time to permit the orderly accomplishment of the purposes of such agreement or grant." (emphasis added)

The legislative history of MSA Section 517(a) makes clear Congress' concern with the practice of obligating funds before necessary planning and organization are sufficiently advanced. Thus it was intended to prevent obligations "until our own officials and the recipient country have reached a firm decision as to what is contemplated jointly to be done: when, where and at what cost."[15] The report of the House Committee on Foreign Affairs continued:

> "This section is intended . . . to encourage ICA [USAID] to carry forward negotiations with foreign governments, to evaluate the readiness of the government to put up the necessary funds, to take appropriate action for such purposes as acquiring rights of way and to encourage both ICA and the government to do sufficient planning and engineering work so as to be informed of all major problems likely to be encountered before United States funds are committed for financing any project. . . .

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[15] H. Rep. No. 1696, 85th Cong., 2d Sess., 51 (1958).

"These provisions are intended to require the ICA to delay the obligation of funds until it has reached a decision that each project has been adequately planned and that the foreseeable obstacles which are to be encountered can be overcome. These provisions should also prevent obligation of a larger amount than estimated to be necessary for any project since such obligation will prevent any subsequent use of any portion of the funds for another purpose. It is recognized, however, that even under this section estimates will not necessarily remain firm. Changes in the work or in costs not foreseeable at the time of the survey will require changes in the ultimate cost."[16] (emphasis added)

Although a GC opinion in 1961 (the "Wilkins opinion")[17] concluded, based on legislative history, that 611(a) applied only to "project" assistance, a 1982 opinion written by Garber Davidson and signed by Kelly Kammerer as Acting General Counsel[18] held that it also applied to non-project assistance. However, keying on the Wilkins opinion' "end-use" or "end-product" rule, the Davidson/Kammerer memorandum agreed that the degree of planning required depended upon the type of assistance and its purpose -- capital projects generally requiring the most and, in those days when non-project assistance ("NPA") was justified primarily on balance of payments grounds, NPA requiring the least.

The Wilkins' "end-product" rule is essentially a purpose test, derived from the statutory words "if" and "requires" in the phrase "if such agreement or grant requires substantive or technical planning". Some types of assistance, for example a CIP provided for balance of payments purposes or a project to finance a physical facility but not a particular one, would not "require" "substantive technical or financial planning" in order to achieve the objectives of the funding. Wilkins argues further that in limiting the required planning to "technical" and "financial", the drafters clearly did not intend to comprehend all planning. Logistical planning, for example, is missing.

Based essentially on practice in the ensuing 20 years, the Davidson/Kammerer opinion extends the logic of the Wilkins' formula to a purpose-based test:

"In summary, the purpose of the assistance will influence the nature and intent of planning required by section 611; generally, a project with a discretely defined purpose and intensive AID monitoring will require more preobligational planning than will a sector-related program with diffuse subactivities. Again caution should

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[16] Id. at 51-52.

[17] John R . Wilkins to Seymour J. Rubin, General Counsel, "Draft Airgram on Section 517(a) of the Mutual Security Act of 1954, as amended", August 4, 1961.

[18] A-GC, Kelly C. Kammerer to AA/PPC, John R. Bolton, "Obligating AID Funds - Meeting Statutory Requirements and Avoiding Deobligations", March 23, 1982.

be exercised in each case, however, because certain factors may call for greater (or less) planning, e.g. ESF vs DA funds, capital intensive project, etc. What planning is necessary is determined by what the assistance is intended to accomplish. If the purpose of the assistance is specific in nature, the planning m ,t address those specifics; if, however, the goals are more general, the planning will address those matters which need identification to assure the objectives are achieved."[19]

The problem with this and other "purpose" tests, however, is that their application cannot be illusory or render the statute meaningless. Congressional intent in the legislative history is very clear: to prevent USAID from obligating funds before it knows their use or in excess of the amount necessary to achieve the purpose of the obligation. Thus the foregoing tests cannot be read as authorizing the elimination of all technical or financial planning where the purpose of the assistance is broadly or vaguely stated. If it is USAID's purpose to achieve a strategic objective through the use of USAID funds in the nature of "project" interventions that will require technical or financial planning, then such planning to some degree must be carried out prior to the obligation for the strategic objective. The question then becomes, to what degree and how.

Past USAID approaches discussed in the next section are instructive. It is clear, however, both from GC interpretations of Section 611 and the various bureau and mission efforts to apply it in the context of "umbrella" agreements and incrementally designed projects, that USAID has not attempted to avoid the planning requirements by making broad or vague obligations. Consistent with law and USAID practice, therefore, in implementing the Reengineering Proposal to obligate at the strategic objective level, USAID cannot say no planning is required because it doesn't know, or doesn't know yet, whether substantive technical or financial planning will be required.

If, as discussed above, USAID's objective is to provide balance of payments support, it would be possible to make a sufficiently definite and binding commitment to a country for its strategic objective that would constitute a valid obligation within the meaning of Section 1501, without doing any planning or even knowing how the country would use the funds (though subject, of course, to any applicable USAID guidelines and rules). On the other hand, where the focus is sector/subsector and designation of measurable results at the obligational stage is critical, considerable advance planning is necessitated, perhaps more than for traditional project assistance. This, in fact, has been the experience of the Africa Bureau with non-project sector assistance ("NPSA") under the Development Fund for Africa ("DFA"). The Africa Bureau's experience with its Country Program Stategy ("CPSP") process also typically has been that it is only in the year following USAID/W's approval of the general statement of a strategic objective that a mission defines its quantifiable indicators. There are a number of reasons for these

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[19] Davidson/Kammerer memo at 15.

two lessons, such as the need to analyze factors other than USAID inputs necessary to the achievement of results and the amount of effort required to realistically establish the results expected. Further, we understand that missions have been reluctant to expend the resources to do such analytical work until they have agreement from the Bureau that a particular strategic objective is acceptable.

Section 611(a), therefore, is fundamentally a purpose test. The planning required depends upon our purpose. If the grant is for a strategic objective and the implementation of that objective will require substantive technical or financial planning, then it must be done prior to obligation. We read the Reengineering Proposal, however, as assuming that extensive planning will in fact be done prior to obligation during the development of the Strategic Plan (including in particular the Operational Resources Plan). We would anticipate that the extent of additional planning that might be required before a strategic objective obligation would vary from case to case. In the final analysis, that is a policy judgment that guidance derived from legal requirements can assist but not make. As a general matter, however, it appears that 611(a)'s requirements should not be a stumbling block to the implementation of the Reengineering Proposal.

D. Prior USAID Experience With Broadly Stated Grant Agreements

One of the first U.S. assistance mechanisms dating back to the Marshall Plan is the Commodity Import Program (CIP). Since that time, the most common objective for CIPs has been balance of payments support. CIPs that obligate funds for such purposes, can be used, at the discretion of the borrower or grantee, for any commodities on the positive list included by USAID in the loan or grant agreement. Since the commitment of funds is firm, definite, and unconditional, and the ability to draw down wholly within the control of the recipient, provided that it meets the reasonable, objective criteria imposed by USAID, the requirements of Section 1501 clearly are met. The requirements of Section 611(a) also are met because the essence of the assistance is not particular commodities or other development results, but the provision and draw-down of the hard currency assistance. Accomplishing the purpose of the CIP is straight-forward and implementation procedures can be easily and clearly stated.

In the late 1970s and early 1980s, USAID regional bureaus attempted to vary the project format for reasons very similar to those driving the reengineering exercise. Thus, bureaus wanted maximum flexibility in authorizing subactivities within a sector, with the possibility of adding, subtracting, or shifting funds without a formal deobligation and reobligation. The following are examples:

- USAID/Cairo and the NE Bureau authorized $269 million in life-of-project funding to create an infrastructure for coordinating and strengthening decentralization activities. This sector program was authorized by a PAAD (Program Assistance Approval Document), but obligated only those funds necessary ($75 million) for four discrete subactivities described in separate

annexes for which all appropriate planning had been done. The PAAD and the agreement also gave illustrative examples of projects that were to be added later. Each subsequent "subactivity" was obligated by incremental funding amendments to the "umbrella" agreement.

- The Central Tunisia Rural Development Project was another "umbrella" or "cluster" project, whose purpose was to promote the social and economic development of Central Tunisia. Although authorized as project, not non-project, assistance, it was similar in many respects to the Egyptian decentralization model. Thus the initial obligation consisted of only three specifically planned subprojects, with future subprojects to be added through amendments to the umbrella agreement. In this case, one of the original subprojects contained an "Experimental Fund", whose purpose was to finance highly innovative pilot projects within the scope of project as defined in an annex.

- In Lebanon in the late 1970s, a grant in the health/social welfare sector had a number of CIP characteristics. Its purpose was simply to finance technical services, commodities and training in the sector. Annex I contained a list of "selected priority projects", however, each with earmarks of grant funds. The Annex foresaw the possibility of varying the funding levels of the initial projects, or adding new subprojects to the list that were within the scope of the overall project.

- In the early 1980s, a project grant agreement established the Joint Commission on Economic and Technical Cooperation with Oman. Although the agreement specified the types of activities eligible for financing, the primary purpose of the $5 million obligation was stated to be the establishment of the Joint Commission. In addressing Section 611, the Project Paper discussed the institutional planning, including limitations on operating expenses.

In recent years, a number of Missions in the ANE Bureau have established Technical Services and Feasibility Studies (TSFS) projects. These projects, obligated by project grant agreements with host governments, basically serve as an umbrella for a variety of small dollar amount activities (say $25,000 - $250,000) which USAID and the host government have agreed are appropriate to undertake in support of agreed program purposes. The grant purpose usually is defined in sectoral terms, and often is intended to complement major projects being undertaken in the same sector by providing a somewhat more flexible funding source for smaller activities and "targets of opportunity". The planning undertaken normally involves an assessment of the institutions and subjects which may require assistance of this scale, but which does not fall within the parameters of larger activities. The Project Paper and project agreement include a list of possible activities for which some degree of planning has been done, but which in fact may serve only to be illustrative. The activities are usually limited to technical assistance and studies, with a specific prohibition against funding construction. The decision to proceed

with individual activities is confirmed by jointly signed PILs.

The Africa Bureau also has approved certain umbrella projects where obligation occurs by project grant agreement before each subactivity is fully planned. This mechanism has been used mainly where there were a series of similar activities, such as support for PVO activities. In lieu of fully-planned subactivities, the Bureau has required that project papers contain criteria and procedures for subactivity selection and approval, an analysis showing how the criteria for subactivity selection will result in accomplishment of the project purpose (the most important and often most difficult part of the planning process), and, to justify the amount of funds, a list of illustrative subactivities costed out.

The Africa Bureau's DFA NPSA programs have a sector/subsector scope and purpose, and quantifiable, measurable results (impacts) incorporated into the purpose statement. Adequate planning for these programs has required, prior to program approval, (1) a sector analysis showing the sector's binding constraints and what other entities are doing in the sector; (2) a concrete statement of the final reforms to be accomplished, a statement of the program's quantifiable, measurable impact, and an explanation of how those reforms will lead to the impact; and (3) specific conditionality for the first disbursement, with benchmarks for the subsequent tranches that are refined into specific conditions precedent (CP) as incremental obligations are made. The PAAD also contains a demonstration that accomplishment of both the reforms and impacts are feasible, which has required examining both the USAID-supported reforms and assuring that someone, whether USAID, the host government, or other donors, is addressing all the other binding constraints critical to achievement of impact.

While experience has shown that this mechanism requires more initial analysis than typical input-oriented projects, it also permits some flexibility during implementation. Intermediate benchmarks can be refined into concrete CPs, specific interventions can be revised consistent with the analytical framework, final reforms and impacts established in the PAAD. It also may be recognized that the analytical framework itself needs revision. Finally, a program would not be continued where the host government is failing to take required actions critical to accomplishing the desired results. Thus, reaching a clear understanding with the host government on the actions it is required to take has been shown to be a critical step in the pre-obligation planning process, and a fundamental part of the grant agreement.

In 1992, USAID/Nepal authorized and obligated the Sustainable Income and Rural Enterprises (SIRE) program. The purpose of SIRE is to concentrate and focus USAID and Government of Nepal ("GON") attention and resources in the agricultural sector towards a single program objective -- "to increase rural household incomes

through sustainable private sector agriculture and forestry enterprise".[20] To do this, the SIRE program combined and integrated four projects already underway in the agricultural sector. At the time of authorization, no new funding was proposed. Instead SIRE subsumed the combined authorized life of those four projects and provided that the unobligated mortgage from those projects would be obligated into SIRE. These funds were then allocated to previously planned program activities based on focused annual workplans and measurable standards of performance. While old funds, already obligated for specific projects were the initial funding for that project, new funding is based on consistency with SIRE's program objective and program outcomes, overall program performance and appropriate planning in advance of new obligations.

The procedural improvements which SIRE is structured to accomplish include:
- A clearer concentration of scarce USAID and GON resources upon a single high priority objective and supporting program outcomes;
- A unified, agreed management framework within which all program activities will operate, be functionally linked and be evaluated;
- Specific performance based indicators against which progress will be regularly measured;
- Shared USAID/GON criteria and procedures which will allow resource shifts from poor performing to strong performing activities; and
- Simplified and more flexible procedures for changing or adding program activities in response to lessons learned and evolving opportunities.

E. The Application of Sections 1501 and 611(a) to the Reengineering Proposal to Obligate by Strategic Objective

1. Grants

The foregoing examples provide a number of models potentially applicable to obligating by bilateral grant agreement for strategic objectives as recommended in the Proposal. These are:

1. An incrementally funded, umbrella grant, with a broadly-framed purpose and measurable results and an analytical framework that describes the interventions necessary to accomplish the results. In this model, "subactivities" or "subprojects" within the scope of the project's purposes are obligated either at the time the agreement is signed (if planned and ready) or by amendment to the umbrella agreement following appropriate planning. Section 611(a) is complied with through appropriate planning for the subactivity prior to the actual obligation; Section 1501 is complied with by obligating for specific activities in a binding, firm, and unconditional commitment. Flexibility is retained by obligating within

[20] SIRE Project Paper, pp.1-2.

the scope of the umbrella agreement, which permits adjustments in funding levels for subactivities within criteria stated in the project agreement, without violating the essential commitment of the funds to the recipient. An agreement with the host country on strategic objectives under this model, however, would actually obligate only those funds for already planned and agreed-upon subprojects, not the full amount intended to be allocated for the strategic objective.

2. A grant agreement with criteria and procedures for subactivity selection and a list of illustrative, costed subactivities, in which the full amount allocated for the strategic objective can be obligated if sufficient planning has been done. In this model, funds are obligated for a broad, but defined purpose, with measurable results and analytical framework to show how implementation will lead to accomplishment of the results. The keys to this model are actual or illustrative "subactivities" or "subprojects", with indicative funding levels, specified in the grant agreement and objective criteria for selecting, judging, and approving the subactivities. Technical and financial planning and negotiation with the recipient prior to obligation are necessary in order to reach agreement on these matters and to reflect them in the obligating document.[21] Section 611(a) is complied with through technical and financial planning for the indicative or illustrative projects as well as institutional and process planning. Section 1501 is complied with by unconditionally transferring control over draw-downs to the recipient, so long as they are within both the broad objectives and the objective criteria and conditions stated in the agreement.[22]

3. The institution building model, such as the Oman Joint Commission and some ICI grants, complies with Section 611(a) by planning for the institutional and administrative processes. It complies with Section 1501 by unconditionally

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[21] The extent of new analysis and planning required will differ for a program agreement which initially consolidates existing activities, and an agreement which sets forth a new strategic objective. We anticipate that in developing a program for a new strategic objective which is not based on existing projects, considerable work will be required, for example, to develop a framework for identifying and analyzing constraints, planning and coordinating interventions, and establishing benchmarks.

[22] This model has some similarities to balance of payments CIPS and grants to Intermediate Credit Institutions (ICI), in the sense that it sets forth overall goals and objective, implementing criteria. Such CIP grants, however, are program assistance whose goals are unrelated to the specifics of the expenditures, while under the Reengineering Proposal the achievement of the strategic objective would be dependent on the specifics of the subprojects. The similarity to ICI projects is in the initial structure and criteria for selecting the subactivities. Model 3, following, also has similarity to the institution-building nature of ICI grants.

transferring control over draw-downs to the recipient, so long as they are within the objective criteria and conditions in the agreement.

Each of the foregoing models can be applied to obligating by strategic objective. As we re d the draft Reengineering Proposal, subactivities in the nature of projects are generally what is contemplated. Thus the first two models above are likely to be the most useful. In the first, funds are obligated by amendment to the "strategic objective" agreement as they come on stream, but not up front. In the second model, funds could be obligated for the overall project, but appropriate (and likely considerable) technical and financial planning, including the develoment of clearly-stated, objective criteria for the use of funds, still would have to be done prior to obligation and clearly-stated.[23] Under either of these approaches, several advantages of obligating by strategic objective posited by the Reengineering Proposal[24] appear to be achievable:

1. Obligation of assistance funds in a document which emphasizes outcomes will be possible. Agreement on the basic approach for achieving the intended outcomes and measuring progress will necessarily involve discussion and identification of likely inputs, and agreement on the process for agreeing on further details.

2. There will be flexibility to shift resources between activities supporting a strategic objective. In each model, once funds have been obligated, they may be reallocated, as appropriate, among subactivities, based on performance experience and other mutually-agreed criteria.

3. Each approach will concentrate USAID and recipient resources and should facilitate agreement on an overall strategy and the means to carry it out.

4. While considerable effort (analysis, planning, negotiation) will be needed to initially enter into strategic agreements, once such agreements are in place we anticipate they will help speed the delivery of assistance. Shifting resources and adding activities (with appropriate planning) should operate more quickly than under USAID's current project-oriented system.

The Reengineering Proposal suggests two other advantages that will result from a

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[23] Note that in the second model, if the entire amount planned for a strategic objective were obligated at one time, or in any event early in the life of a strategic agreement, USAID probably would have less control over actual uses than in the first model, because of the control necessary to be shifted to the grantee in order to make a valid obligation.

[24] See Reengineering Proposal at 11-13.

system which obligates by strategic objective -- obligation early in the fiscal year and predictability to Missions as to their funding levels during the year, and from year-to-year. We believe that once a strategic objective agreement, such as a grant agreement with a recipient country, has been entered into and the various other aspects of the reengineered system are operational, the possibility of obligating funds into such an agreement earlier in each fiscal year may be facilitated. We would note, however, that the availability of funds for obligation during a fiscal year and from year-to-year are governed primarily by appropriation and budget processes, including the operating year budget process within the Agency. In the real world, these processes are far more likely to control the timing of obligations and predictability of funding than are the development of mechanisms that obligate for strategic objectives within the strictures of the law on obligation and planning.

2. Contracts

In recent years, obligations by contract have been used increasingly throughout the Agency, but especially in ENI programs which are structured regionally and generally do not involve bilateral project grant agreements. An initial reason for structuring the program in this manner was to obligate resources quickly, without the protracted delays which can occur in negotiating projects with host governments. Another is to preserve flexibility in allocating funds on a country-by-country basis each fiscal year, thereby avoiding the appearance of entitlements to funding levels in particular countries.

As discussed above, contracts require greater specificity than grants to constitute obligations under Section 1501. Thus, although the Reengineering Proposal will move USAID increasingly to contracting for results through devices such as performance based contracting (see part III, following), the requirements for recording an obligation will require, for example, that specific goods or services be identified. In the case of the "typical" technical assistance contract, this requirement would appear not only to demand planning in greater detail than is required for grant obligations but also would reduce flexibility to make adjustments in the specified work and shift resources to other activities.

If the contract is in the nature of an indefinite quantity contract, the scope of work can be for very broadly stated objectives and flexibility preserved in the identification of the specific tasks needed to carry out those objectives. However, the Comptroller General Opinions are clear that the obligation itself takes place only when the specific goods or services are identified and ordered. This would appear to limit USAID's ability to obligate funds earlier in fiscal years and to obligate larger amounts for broader purpose, as might be done, for example, under the second grant model above.

Finally, for all contracts intended to be strategic obligations, special consideration will have to be given to the nature and extent of the host government's role in setting

overall strategy and agreeing on implementation approaches. In the ENI region, host government involvement normally is achieved informally. Nonetheless, host government commitments and inputs, and their agreement to contractual scopes of work, have to be obtained whether through Memoranda of Understanding or otherwise. Accordingly, Sections 611 and 1501 will also demand planning and clearly stated host government commitments prior to contractual obligations.

Under the Reengineering Proposal, USAID will make its contracting more result-oriented and obtain a number of programmatic benefits. In general, however, the use of contracts to obligate funds at the strategic objective level will be more problematic than with grant mechanisms.

III. PROCUREMENT ISSUES

The goals of the Reengineering Proposal -- to make USAID's procurements faster, simpler, more responsive to the field and more performance-based -- are positive and appealing. Although public procurement policy must consider other goals as well, such as fairness, and accountability, we agree that the emphasis on speed, simplicity, and performance is entirely proper in the USAID context.

Two of the principal approaches advanced in the Reengineering Proposal, prequalification of offerors and "de-linearized procurement," raise difficult legal issues. A third proposal, performance-based contracting, is already called for by Executive Branch policy, but we wish to caution that the Reengineering Proposal appears to overlook the severe constraints which make performance-based contracting difficult for most USAID procurements. We will discuss these issues in the paragraphs below.

In addition, we would briefly note at the outset that the Reengineering Proposal discusses only USAID direct contracting ideas. Some thought might be given to the application of similar ideas to the host country contracting process. Host country contracting often serves as a viable option for delivering assistance to countries and should be recognized in our reengineering effort.

A. Prequalification. The Reengineering Proposal contemplates that prequalification of potential contractors and grantees will save procurement processing time and reduce paperwork.[25] With respect to contractors, the Reengineering Proposal states:

> "Potential contractors could be pre-qualified in terms of a "short-list" of firms for USAID requirements in, for example, the health sector in Latin America. RFPs could be issued directly to the short-listed firms. After the initial prequalification

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[25] Reengineering Proposal at 25.

process, savings would be in shortened advertising time, shortened proposal preparation times and less paperwork."[26]

Contrary to these hopes, as is shown in the following discussion, prequalification of potential contractors would likely increase USAID's paperwork and administrative burden and not save advertising or proposal preparation time.

The GAO has long been opposed to prequalification of potential contractors, as prequalification goes against the principles of full and open competition. However, in 1985, Congress authorized, under restrictive conditions, the use of prequalification in a statute codified at 41 U.S.C. § 253c (copy attached as Appendix 2)[27]. The background of this statute is that it was not intended to encourage the narrowing of competition through "short lists" as envisioned by the Reengineering Proposal. Rather, as the heading of the section indicates, the statute was intended to encourage new competition, especially by small businesses who complained of being shut out of procurements (particularly, sole-source procurements) the requirements for which they were quite capable of meeting.[28] Recognizing that prequalification has anticompetitive aspects, Congress authorized it under limited circumstances, requiring, among other things, that the agency, before using a "qualification requirement" (a "requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract"):

- prepare a written justification of the need for the qualification requirement;

- give a written specification to each prospective offeror of all requirements which must be met under the qualification requirement, the requirements being limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

- ensure that each potential offeror is given a prompt opportunity to demonstrate its ability to meet the qualification requirement; and

- review, within seven years of establishing the qualification requirement, the need for it.

Following the enactment of this statute, the Federal Acquisition Regulation

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[26] Id.

[27] The similar provision for military agencies is codified at 10 U.S.C. § 2319.

[28] Congress particularly had in mind the case of spare parts procurements by the U.S. military, which were apparently often done on a "sole source" basis with large defense contractors.

("FAR") was amended to add a Subpart 9.2 on qualification (copy attached as Appendix 3). It reinforces the notion that prequalification may be used for quality assurance reasons, but not as a means to avoid the usual FAR procurement rules. In addition to promulgating the above-noted requirements of the statute (see FAR 9.202 generally), the FAR clarifies, in FAR 9.202(c), that if a potential offeror can demonstrate to the satisfaction of the Contracting Officer that it (or its product) meets the qualification standards (or can meet them before the date of the contract award), the offeror cannot be denied the opportunity to submit an offer solely because it is not on the agency's "qualified bidders list." FAR 9.205 requires agencies to publish notices of intended qualification requirements in the Commerce Business Daily. FAR 9.206-1(e) dictates that, contrary to the Reengineering Proposal's hopes that prequalification would save time, the general procurement synopsizing requirements of FAR Subpart 5.2 still apply, and agencies are to use the "maximum time, consistent with delivery requirements, between issuing the solicitation and the contract award" and that, as a minimum, the Contracting Officer is to allow the time frames specified in FAR 5.203 (e.g., 30 days between the date of RFP issuance and the contract award).

These provisions clearly dictate that prequalification is not to be used to compress the procurement cycle or to narrow the universe of preferred contractors to a "short list" to the exclusion of other capable offerors. The effect of the statute and the FAR provisions is plainly intended to be inclusive toward potential offerors, not exclusive as contemplated by the Reengineering Proposal. Were USAID to attempt to procure services and commodities only from short-listed firms as contemplated by the above-quoted language in the Reengineering Proposal, this could lead to successful protests before the GAO by disappointed firms which were capable of performing but unable to compete for USAID's business under the prequalification scheme. Given that the Competition in Contracting Act ("CICA") generally requires "full and open competition" for agency procurements, it could be difficult for USAID to convince the GAO that its restrictive prequalification policy was justified. Moreover, it should also be noted that the prequalification process itself would require substantial administrative effort and raise various issues, including the major issue of which firms should be prequalified for work in precisely which sectors. Given the prevalence of "body shopping" among USAID contractors, prequalification would be especially problematic. In short, with respect to contractor prequalification, it appears to GC that prequalification under the FAR Subpart 9.2 provisions generally would not seem to achieve benefits commensurate with its costs.

Please note, however, that the Agency already has the ability, in appropriate circumstances, to conduct procurement with a limited number of potential contractors or suppliers without resorting to prequalification procedures. Under a special limited

competition procedure for NIS procurements approved by the Administrator[29] under USAID's "foreign assistance impairment" exemption authority[30] from CICA's full and open competition requirements, USAID has had the ability, if it chooses, to use only limited competition (soliciting offers from as many offerors as practicable under the circumstances) for these procurements. This authority has been used sparingly because of the perceived advantages of full and open competition. Nevertheless, if USAID wished to make greater general use of restricted tendering, use of this impairment authority to develop special limited-competition arrangements for other high-priority and politically driven USAID programs would appear to be more feasible, as a legal and practical matter, than attempting to make use of the FAR Subpart 9.2 qualification provisions. It also always should be borne in mind that, apart from any such special programs, USAID has available to it in particular circumstances important exceptions from CICA's competition requirements, such as the sole-source and "unusual and compelling urgency" exemptions found in FAR 6.302-1 and 6.302-2.[31] While the above-noted exceptions exist, they are obviously of limited applicability and not basic solutions to this problem.

With respect to "prequalification" of grantees, the Reengineering Proposal seems more promising. In this context, it contemplates reducing the time spent by Grant Officers in connection with determining that a potential grantee meets the various requirements specified in Handbook 13, Chapter 4D (with respect to management ability, accounting, record keeping, financial management, personnel and travel policies, etc.). Although it is our understanding that Grant Officers attempt to use discretion and good judgment in deciding how much of this ground needs to be re-plowed in connection with subsequent grant applications by the same entity, it probably would indeed be useful to streamline these systems investigations by providing for some sort of certification of these systems that would last a set amount of time and obviate the need for redundant investigations until after this period expired.[32]

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[29] The special procedure was approved in April 1992 for one year and was renewed for one year in 1993. We understand that the ENI Bureau currently is in the process of extending the procedure and simultaneously expanding it to EUR countries.

[30] AIDAR 706.302-70.

[31] Other exemptive authorities of potential utility, albeit limited, include the "notwithstanding" authorities enjoyed by various USAID programs and Sections 633(a) and 636(b) of the Foreign Assistance Act.

[32] Currently, HB 13 discusses the opposite situation as to when a pre-award survey of a prospective grant recipient is required, providing that one should normally be done if the prospective recipient has never had a USAID grant, cooperative agreement or contract or has not had any Federal agency award during the last five years.

B. "De-linearized Procurement". The proposal to have the design and procurement process "de-linearized" through having procurement proceed in parallel with the design of particular projects seems somewhat unrealistic and, if carried to extremes, would create the potential for procurement protests. As explained on page 23 of the Reengineering Proposal, it is contemplated that "a number of steps in the procurement process -- advertising, SOW preparation, RFP preparation, issuance of the RFP, and even receipt of offers -- can be done in parallel with the development of strategy and design."

It seems to us, however, that, while USAID can take certain steps to compress and integrate the design and procurement processes[33], fundamentally, design and procurement are sequential steps. If we are in the procurement (contract) realm where USAID is seeking to procure services or goods under the FAR, it generally will be necessary for USAID to have determined its needs through the design process before an RFP can be issued. Under CICA and the FAR, federal agencies are to secure full and open competition for their procurements and, to obtain the required competition, must contract on the basis of common, unambiguous specifications. An RFP which is very vague because USAID has not yet determined the design of the activity may thus fail to comply with CICA and FAR requirements and lead to procurement protests.[34] Moreover, if USAID were to issue RFPs before completing the necessary design work, amendments of the RFP (and perhaps the required notice in the Commerce Business Daily) could well become necessary as USAID's intentions were refined, thus leading to delays (to allow contractors time to respond to the changes) and to inappropriate cost increases (for the contractors and ultimately USAID). Premature issuances of RFPs could also, of course, lead to poor procurement results and make required budgeting and planning difficult.

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[33] For example, by concentrating earlier in the process on a statement of work for the procurement, by having project officers and contracting officers work more closely together and by speeding up the clearance process for PIO/Ts. We commend the Reengineering Proposal's advocacy of such changes in the "Procurement Teamwork" section on page 23. In special circumstances USAID may occasionally issue a procurement solicitation in advance of, and contingent upon, the availability of funds.

[34] "The full and free competition required cannot be obtained unless the invitation and specifications are sufficiently definite to permit the preparation and evaluation of bids on a common basis. . . . There can be no legal competition unless the bidders are competing on a common basis; no intelligent bidding for a contract unless all bidders know what the contract requirements will be." 39 Comp. Gen. 570, 572 (1960).

We would note that USAID need not micro- or over-design its projects. Especially to the extent that USAID can engage in performance-based contracting (see discussion below concerning the limitations thereof), USAID can specify what it wants the contractor to accomplish and leave it to the contractor to determine the best means to accomplish those objectives. As explained in the previous paragraph, however, USAID must specify in the RFP what it wants accomplished.[35] To the extent that the Reengineering Proposal may be contemplating that USAID need not determine its needs because the scope of work can be done by the winning offeror, we would note that this would also tend to run afoul of the organizational conflict provision in FAR 9.505-2(b)(1) dictating that a contractor which prepares a work statement is precluded from competing for the implementation contract.[36]

C. Performance-based Contracting. The Reengineering Proposal embraces performance-based contracting ("PBC") enthusiastically, stating that USAID could avoid dictating the design of projects and instead "once USAID identifies the outcome/results desired under a particular strategic objective, an RFP can be issued requesting offerors to: show how they would achieve the outcome/results, describe the milestones they would hold themselves accountable to along the way, describe the cost-containment measures they would self-impose, describe what it would cost, and the profit the offeror would give up if it did not reach milestones or deliver the final outcome."[37] In advocating PBC, the Reengineering Proposal urges that USAID make greater use of fixed-price and incentive contracts.[38]

As discussed in Appendix 5, PBC-style contracting is now approved U.S. Government policy, and it is clearly desirable for USAID to employ PBC where feasible. Thus, for example, it would clearly be preferable for USAID to specify the number of malnourished children it expected a contractor to assist in a certain way, together with interim benchmarks and incentives for reaching greater numbers, than to contract for a more general goal regarding such children with a level of effort by the contractor specified in terms of person hours.

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[35] The importance of defining in the statement of work what an agency wants to procure was recently emphasized by Steven Kelman, the Administrator of OMB's Office of Federal Procurement Policy, as noted in the May 24, 1994 article from the Washington Post attached as Appendix 4.

[36] In CIB 94-2, USAID recently toughened its organizational conflict of interest policy in respect of this FAR provision in recognition of the FAR dictate and the conflicts between design and implementation.

[37] Reengineering Proposal at 24-25.

[38] Id. at 24.

On the other hand, while GC strongly supports increased use of PBC, in our view, USAID is likely to have significant practical difficulties in applying it in the manner and for the goals apparently contemplated by the Reengineering Proposal. Given PBC's emphasis on results and measurable performance standards, PBC works well only for procurements where the results can be measured and quantified and where the achievement of those results is within the contractor's control. Such is not USAID's typical operating environment, however. In the difficult and multi-faceted LDC environments in which USAID's results are sought, it is often not easy to quantify and measure results achieved by a contractor, both because in the great majority of USAID procurements the results sought may be inherently difficult to measure[39] and because, even in a case where results appear to be measurable,[40] many other factors, beyond the control of any contractor, may influence the achievement of those results by the contractor.

Under these circumstances, reasonable contractors are not willing to "guarantee" the achievement of meaningful results through fixed-price contracts, nor would USAID expect them to. (Fixed-price contracts would discourage most reasonable contractors from bidding in these circumstances and would lead those contractors that did bid to increase their prices to cover the likely risks and problems of performance.) Thus, USAID procurements have generally been conducted based on the belief that cost-reimbursement contracts, under which contractors promise to give their "best efforts" to achieve the contract objectives in return for compensation, are more realistic and fair under these circumstances. Of course, even in a particular procurement where a cost-reimbursement contract is considered more appropriate than a fixed-price contract, it may sometimes be possible to increase the contractor's incentive for good performance by including the possibility of incentive awards. The incentive awards themselves, of course, should be based on objectively quantifiable performance standards whose achievement is within the control of the contractor.

If USAID wants to achieve measurable "results" through PBC, such a move would be facilitated by simpler designs, calling for more straightforward and well-defined (some would say more "limited") results. It is more likely that the contractor's progress toward meeting such straightforward contract objectives could be measured and quantified and would be within the contractor's control, thus making PBC more appropriate, as discussed above.[41]

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[39] E.g., procurements for institution strengthening or the provision to host governments of specialized advice, including legal and economic advice.

[40] E.g., reducing the annual population growth rate of a given country to 2%.

[41] E.g., contract to build a given number of fertility clinics on a fixed price basis per clinic, perhaps with additional price incentives based on the number of individuals served.

The problems of using PBC in USAID procurements are increased to the extent that the Reengineering Proposal appears to be contemplating that contractors will play a significant role in designing projects. The language of the Reengineering Proposal quoted above suggests that USAID contractors would be asked to show how they would achieve USAID's desired outcome/results, including a description of the milestones they would hold themselves accountable for achieving. Having contractors set their own performance standards, especially under a broad and vague RFP, is questionable, for they would tend (especially if any incentive award were at stake) to make the standards as easy to satisfy[42] as the contractors believed they could get away with.[43]

We would note that, apart from the salutary incentive effects of PBC on contractor performance, another way to encourage contractors to deliver good performance is to make past performance on other contracts a significant evaluation factor in the award of new contracts. The Office of Procurement, in consultation with GC, is currently working on systems to do this. This endeavor also raises difficult issues due to the inherent problems of objectively measuring performance by USAID contractors, but, in keeping with USG policy, USAID will attempt to devise a fair system that does take performance into account in awarding contracts -- one that does not create a mine field of protest possibilities.

The Reengineering Proposal also includes one sentence suggesting that PBC principles might be applied to USAID grant-making: "Similarly, wherever possible USAID should structure grant programs so that performance objectives are clearly identified, as well as the means by which progress will be measured."[44] We would simply note that too much specification by USAID of objectives could suggest that USAID was attempting to use an assistance instrument to pursue its own program, which the Federal Grant and Cooperative Agreement Act might call for a contract to achieve. (This statute was discussed at length in GC's memo to Senior Staff of January 14, 1994, which will not be repeated here.) In addition, under the requirements of OMB Circular A-110, it also would be difficult for USAID to withhold payment of grant monies to a grantee or cooperative agreement recipient which did not achieve USAID's objectives. It thus appears to GC that perhaps the best way to motivate grantees and cooperative agreement recipients to achieve good results is through financial incentives, not on the particular assistance instrument at hand, but rather in respect of the prospect of future

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[42] E.g., through either (1) quantifiable but low standards or (2) high-sounding but vague standards.

[43] In addition, as noted above under the de-linearized procurement discussion, it should be noted that an RFP which is so vague and ambiguous that it precludes effective competition can be found to violate CICA, and can raise budgetary and planning issues.

[44] Reengineering Proposal at 24.

awards if good performance is achieved.

IV. OTHER STATUTORY LIMITATIONS ON USES OF FUNDS

There are two additional general categories of statutory provisions which apply to USAID programs -- provisions which affect the eligibility of countries for U.S. foreign assistance, and provisions which apply to the uses of assistance resources.

In the country eligibility category, included are prohibitions (or in some cases limitations) on assistance to countries which are major drug producing or transit countries, communist countries, in default on U.S. loans or supporters of international terrorism, among several other provisions. (The country assistance statutory checklist normally prepared annually for each country sets forth the complete list.) These statutory provisions affect the decision on whether assistance can be provided to a country at all, not the manner in which the assistance is obligated or used. Thus, they do not directly affect the operational issues discussed in Sections II and III above.

There are numerous specific provisions on the use of assistance resources (also the subject of a statutory checklist which is prepared in connection with the design and obligation of individual projects and programs). Included in this category are provisions which define developmental objectives (e.g., agricultural and rural development) and emphases (e.g., the poor majority, women in development and appropriate technology). There are also specific limitations on the uses of USAID assistance funds (e.g., restrictions related to abortion, the export of U.S. jobs, U.S. procurement, cargo preference, to name several) and requirements relating to how USAID funds are accounted for (e.g., separate accounts for cash assistance and local currency generations). To the extent applicable to a particular project or activity, the relevant obligation document (grant or contract) includes explicit clauses which carry out the requirements and restrictions. The statutory provisions in this category also do not bear directly on the aspects of the Reengineering Proposal discussed above. They will continue to apply to the use of assistance funds under the existing and proposed new operational systems.

Appendix 1

N ACCOUNTING

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Government obligations.

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ACCOUNTS

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appropriations for indefinite

ppropriation accounts.

SUBCHAPTER I—GENERAL

§ 1501. Documentary evidence requirement for Government obligations

(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of—

(1) a binding agreement between an agency and another person (including an agency) that is—

(A) in writing, in a way and form, and for a purpose authorized by law; and

(B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided;

(2) a loan agreement showing the amount and terms of repayment;

(3) an order required by law to be placed with an agency;

(4) an order issued under a law authorizing purchases without advertising—

(A) when necessary because of a public exigency;

(B) for perishable subsistence supplies; or

(C) within specific monetary limits;

(5) a grant or subsidy payable—

(A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law;

(B) under an agreement authorized by law; or

(C) under plans approved consistent with and authorized by law;

(6) a liability that may result from pending litigation;

(7) employment or services of persons or expenses of travel under law;

(8) services provided by public utilities; or

(9) other legal liability of the Government against an available appropriation or fund.

(b) A statement of obligations provided to Congress or a committee of Congress by an agency shall include only those amounts that are obligations consistent with subsection (a) of this section.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 927.)

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n Accounts.—(a) [670] Whenever
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bligated from Bolivia, without regard to sec
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security interests of the United States to
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y obligated for Haiti and $250,000 in PM
section 518, the proviso in section 515(b
Financing, and Related Programs Appro
ions 620(q) and 660 of the Foreign Assis
eq.), or any other provision of law within

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section 621 of the Act, I hereby:
thority conferred upon the President to
urpose of transferring ESF funds avail-
this determination to, and consolidating
and 6 of Part II of the Act for Haiti, and
y other actions appropriate with respect
8 of June 25, 1993, 58 F.R. 37631).
May 3, 1993, the President, pursuant to

$5 million of funds made available for
ear 1993 for the cost of direct loans be
le for section 551 of the Act.
14(a)(1) of the Act, I hereby determine
d States to furnish $5 million for assist-
enegro without regard to any provision
ction 660 of the Act. I hereby authorize
nation No. 93-20 of May 3, 1993, 58 F.R.

mber 28, 1993, the President, pursuant

$424,000 of funds made available for
of direct loans be transferred to, and
Part II of the Act.
aforesaid $424,000 in the funds made
for assistance to the Government of
the government's prior efforts to re-
No. 93-40 of September 28, 1993, 58

the Secretary of State, the President
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sion of assistance under Chapter 6 of
e available for such assistance is impor-

$6.82 million of funds made available
Act be transferred to, and consolidat-
the Act, and then transferred to, and
purposes of the Act." (Presidential Determi-

not to exceed 10 per centum of the funds made available for any provision of this Act (except funds made available pursuant to title IV of chapter 2 of part I or for section 23 of the Arms Export Control Act) [671] may be transferred to, and consolidated with, the funds made available for any [671] provision of this Act, (except funds made available under chapter 2 of part II of this Act) [672] and may be used for any of the purposes for which such funds may be used, except that the total in the provision for the benefit of which the transfer is made shall not be increased by more than 20 per centum of the amount of funds made available for such provision.

(b) [673] The authority contained in this section and in sections 451, 506,[674] and 614 shall not be used to augment appropriations made available pursuant to sections 636(g)(1) and 637 or used otherwise to finance activities which normally would be financed from appropriations for administrative expenses.[674]

(c) [675] Any funds which the President has notified Congress pursuant to section 653 that he intends to provide in military assistance to any country may be transferred to, and consolidated with, any other funds he has notified Congress pursuant to such section that he intends to provide to that country for development assistance purposes.

Sec. 611.[676] **Completion of Plans and Cost Estimates.**—(a) No agreement or grant which constitutes an obligation of the United States Government in excess of $500,000 [677] under section 1501 of title 31, United States Code,[678] shall be made for any assistance authorized under chapter 1 of part I, title II of chapter 2 of part I, or chapter 4 of part II— [679]

(1) if such agreement or grant requires substantive technical or financial planning, until engineering, financial, and other plans necessary to carry out such assistance, and a reasonably firm estimate of the cost to the United States Government of providing such assistance, have been completed; and

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[671] The parenthetical phrase was added by sec. 301 of the FA Act of 1969. Sec. 10(a) of the International Narcotics Control Act of 1990 (Public Law 101-623; 104 Stat. 3356) inserted reference to sec. 23 of the Arms Export Control Act, but, in an enrolling error, this text was inserted inside the parenthesis. Should probably read "* * * for any provision of this Act (except funds made available pursuant to title IV of chapter 2 of part I) or for section 23 of the Arms Export Control Act may be transferred to * * *". Sec. 10 also struck out "other" at the place noted and provided that "(b) The amendments made by subsection (a) apply with respect to funds made available for fiscal year 1991 or any fiscal year thereafter.".

[672] The parenthetical phrase was added by sec. 19(a)(1) of the FA Act of 1974.

[673] Sec. 301(c) of the FA Act of 1967 inserted "506" for "510".

[674] The final sentence of subsec. (b), which had been amended by the FA Act of 1966, was repealed by sec. 10(b)(2) of the International Security Assistance Act of 1978 (Public Law 95-424; 92 Stat. 785). It formerly read as follows:

"Not to exceed $9,000,000 of the funds appropriated under section 402 of this Act for any fiscal year may be transferred to and consolidated with appropriations made under section 637(a) of this Act for the same fiscal year, subject to the further limitation that funds so transferred shall be available solely for additional administrative expenses incurred in connection with programs in Vietnam.".

[675] Subsec. (c) was added by sec. 19(a)(2) of the FA Act of 1974.

[676] 22 U.S.C. 2361.

[677] Sec. 1208 of the International Security and Development Cooperation Act of 1985 (Public Law 99-83; 99 Stat. 278), raised this amount from $100,000.

[678] This reference to 31 U.S.C. 1501 replaced an earlier reference to 31 U.S.C. 200.

[679] The words "chapter 1 of part I, title II of chapter 2 of part I, or chapter 4 of part II" were inserted in lieu of "titles I, II, and VI of chapter 2 and chapter 4 of part I" by sec. 102(g)(2)(D) of the International Development and Food Assistance Act of 1978 (Public Law 95-424; 92 Stat. 943).

(2) if such agreement or grant requires legislative action within the recipient country, unless such legislative action may reasonably be anticipated to be completed in time to permit the orderly accomplishment of the purposes of such agreement or grant.

(b) Plans required under subsection (a) of this section for any water or related land resource construction project or program shall include a computation of benefits and costs made insofar as practicable in accordance with the principles, standards, and procedures established pursuant to the Water Resources Planning Act [880] (42 U.S.C. 1962, et seq.) or acts amendatory or supplementary thereto.

(c) To the maximum extent practicable, all contracts for construction outside the United States made in connection with any agreement or grant subject to subsection (a) of this section shall be made on a competitive basis.

(d) Subsection (a) of this section shall not apply to any assistance furnished for the sole purpose of preparation of engineering, financial, and other plans.

(e) [881] In addition to any other requirements of this section, no assistance authorized under chapter 1 of part I, title II of chapter 2 of part I, or chapter 4 of part II [882] shall be furnished with respect to any capital assistance project estimated to cost in excess of $1,000,000 until the head of the agency primarily responsible for administering part I of the Act has received and taken into consideration a certification from the principal officer of such agency in the country in which the project is located as to the capability of the country (both financial and human resources) to effectively maintain and utilize the project taking into account among other things the maintenance and utilization of projects in such country previously financed or assisted by the United States.

Sec. 612.[883] Use of Foreign Currencies.—(a) Except as otherwise provided in this Act or other Acts, foreign currencies received either (1) as a result of the furnishing of nonmilitary assistance under the Mutual Security Act of 1954, as amended, or any Act repealed thereby and unobligated on the date prior to the effective date of this Act, or (2) on or after the effective date of this Act, as a result of the furnishing of nonmilitary assistance under the Mutual Security Act of 1954, as amended, or any Act repealed thereby, or (3) as a result of the furnishing of assistance under part I, which are in excess of the amounts reserved under authority of section 105(d) of the Mutual Educational and Cultural Exchange Act of 1961 or any other Act relating to educational and cultural ex-

[880] The reference to this Act was added by sec. 1208(2) of Public Law 99-88 (99 Stat. 278), and replaced an earlier reference to a document entitled: "Principles and Standards for Planning Water and Related Land Resources, dated October 25, 1973.". The reference to the 1973 document was substituted in lieu of a reference of the "Memorandum of the President dated May 15, 1962" by sec. 117 of the International Development Cooperation Act of 1979 (Public Law 96-53; 93 Stat. 365). Previously, sec. 301(c) of the FA Act of 1963 had substituted the reference to the 1962 memorandum in lieu of a reference to "circular A47 of the Bureau of the Budget.".

[881] Subsec. (e) was added by sec. 301(d) of the FA Act of 1967.

[882] The words "chapter 1 of part I, title 2 of chapter 2 of part I, or chapter 4 of part II" were inserted in lieu of "titles I, II, or VI of chapter 2 or chapter 4 of part I" by sec. 102(g)(2)(E) of the International Development and Food Assistance Act of 1978 (Public Law 95-424; 92 Stat. 943).

[883] 22 U.S.C. 2362. Subsection designation "(a)" in sec. 612 was added by sec. 301(d)(1) of the FA Act of 1963.

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(b) [884] Any Act of Cong
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[885] As used in this sub
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(c) [887] In addition to fi
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[884] Subsec. (b) was added by sec. 30
was redesignated by sec. 301(c) of the
sec. 104(t) of Public Law 480 (the Iati
of Public Law 480).

[885] The first sentence of this parag
read as follows: "The President shall
extent possible, United States-owned

[886] This paragraph was added by s

[887] Subsec. (c) was added by sec. 30

Appendix 2

toward complainant to support claim for proposal preparation costs. (1979) 58 Comp.Gen. 575.

38. Standard of judicial review

Unsuccessful bidder on government contract awarded with independent approval of source selection official and contracting officer faced substantial burden of demonstrating that neither official's decision was premised on rational basis. General Elec. Co. v. Kreps, D.C.D.C.1978, 456 F.Supp. 468.

§ 253c. Encouragement of new competition

(a) "Qualification requirement" defined

In this section, "qualification requirement" means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

(b) Agency head; functions; prior to enforcement of qualification requirement

Except as provided in subsection (c) of this section, the head of the agency shall, before enforcing any qualification requirement—

(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;

(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

(4) ensure that a potential offeror is provided, upon request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d) of this section) its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another agency obtained through interagency agreement, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

(5) if testing and evaluation services are provided under contract to the agency for the purposes of clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract

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to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

(c) Applicability; waiver authority; referral of offers

(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute prior to October 30, 1984.

(2) Except as provided in paragraph (3), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement. After considering any comments of the advocate for competition reviewing such determination, the head of the procuring activity may waive the requirements of paragraphs (2) through (5) of subsection (b) of this section for up to two years with respect to the item subject to the qualification requirement.

(3) The waiver authority contained in paragraph (2) shall not apply with respect to any qualified products list.

(4) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement, if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

(5) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 637(b)(7) of Title 15 if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(6) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) of this section or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(d) Number; qualified sources or products; fewer than two actual manufacturers; functions of agency head

(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the costs incurred by the agency.

(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 632 of Title 15.

(e) Examination; need for qualification requirement

Within seven years after the establishment of a qualification requirement, the need for such qualification requirement shall be examined and the standards of such requirement revalidated in accordance with the requirements of subsection (b) of this section. The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2) of this section.

(f) Enforcement determination by agency head

Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not

thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b) of this section.

(June 30, 1949, c. 288, Title III, § 303C, formerly § 303D, as added Oct. 30, 1984, Pub.L. 98–577, Title II, § 202(a), 98 Stat. 3069, and renumbered § 303C, Nov. 8, 1985, Pub.L. 99–145, Title XIII, § 1304(c)(4)(A), 99 Stat. 742.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1984 Act. Section 4 of S. 2489 also prescribes procedures which must be followed by a Federal agency before it may establish any prequalification requirement with which a prospective contractor must comply before his offer will even be considered by the agency for a contract award. Three basic requirements are prescribed.

First, the agency must examine the need for establishing the prequalification requirement, given its adverse impact on free and open competition. Having established that a need for a prequalification requirement exists, the agency must prepare a written justification which explains that need.

Second, the agency must specify the standards which a prospective contractor, or its product, must satisfy in order to become qualified. In developing these qualification standards, S. 2489 directs the agency to limit them to those essential to "meet the purposes necessitating the establishment of the prequalification requirement". The Committee made this modification to section 4 to make clear the nexus between the standards to be met and the agency's justification for the prequalification requirement.

Third, the executive agency imposing the prequalification requirement must promptly provide a prospective contractor with the opportunity to demonstrate its ability to meet the standards the agency has specified for qualification....

By placing a statutory obligation on the agency to afford a prospective contractor the opportunity to become prequalified, the Committee seeks to make clear that the testing and evaluation function for the purpose of prequalifying prospective contractors or their products should not be consistently accorded a low priority in the competition for the necessary agency resources. Consistent with the demands of the primary agency mission attainment, and the importance of procurement in the attainment of mission objectives, it is the Committee's intention that the agency must make every reasonable effort to afford the prospective contractor a fair and impartial chance to demonstrate its ability, or, that of its product, to fulfill the agency's prequalification standards....

In addition to prescribing procedures relating to the establishment of new prequalification requirements or the enforcement of existing ones, section 4 of S. 2489 also requires and executive agency responsible for the procurement of supplies or services covered by a prequalification requirement to take affirmative steps to encourage new competitors, and particularly small business competitors, to seek prequalification. If the number of currently prequalified sources is below the specified threshold, the agency is required to take two types of actions to encourage new sources to seek prequalification.

First, the agency is required to periodically place notices in the *Commerce Business Daily* soliciting additional contractors to seek prequalification for themselves or their products. Through these notices, new competitors will know that a sheltered market with few competitors exists and may be ripe for their competition.

Second, the agency is required to bear the cost of conducting the testing and evaluation necessary to demonstrate that a prospective contractor, or its product, meets the prequalification standards specified by the agency, only if the prospective contractor (a) is a small business concern which can reasonably be expected to compete for future procurements; (b) attains prequalification by fulfilling the agency's specified standards to the satisfaction of the cognizant agency; and (3) is able to attain prequalification while the number of prequali-

cating prior unsatisfactory performance by the prospective contractor;

(c) State whether the contracting office will participate in the survey;

(d) Specify the date by which the report is required. This date should be consistent with the scope of the survey requested and normally shall allow at least 7 working days to conduct the survey; and

(e) When appropriate, limit the scope of the survey.

9.106-3 Interagency preaward surveys.

(a) When the contracting office and the surveying activity are in different agencies, the procedures of this section 9.106 and Subpart 42.1 shall be followed along with the regulations of the agency in which the surveying activity is located, except that reasonable special requests by the contracting office shall be accommodated.

(b) For contracts or contract modifications expected to exceed $100,000, the surveying activity shall furnish with its report a list of all persons, classes of persons, and to the maximum extent practicable, the names of all individuals within the class, who have been provided access to the proprietary or source selection information (see 3.104-5(d)) at or by the surveying activity.

9.106-4 Reports.

(a) The surveying activity shall complete the applicable parts of SF 1403, Preaward Survey of Prospective Contractor (General); SF 1404, Preaward Survey of Prospective Contractor—Technical; SF 1405, Preaward Survey of Prospective Contractor—Production; SF 1406, Preaward Survey of Prospective Contractor—Quality Assurance; SF 1407, Preaward Survey of Prospective Contractor—Financial Capability; and SF 1408, Preaward Survey of Prospective Contractor—Accounting System; and provide a narrative discussion sufficient to support both the evaluation ratings and the recommendations.

(b) When the contractor surveyed is a small business that has received preferential treatment on an ongoing contract under Section 8(a) of the Small Business Act (15 U.S.C. 637) or has received a Certificate of Competency during the last 12 months, the surveying activity shall consult the appropriate Small Business Administration field office before making an affirmative recommendation regarding the contractor's responsibility or nonresponsibility.

(c) When a preaward survey discloses previous unsatisfactory performance, the surveying activity shall specify the extent to which the prospective contractor plans, or has taken, corrective action. Lack of evidence that past failure to meet contractual requirements was the prospective contractor's fault does not necessarily indicate satisfactory performance. The narrative shall report any persistent pattern of need for costly and burdensome Government assistance (e.g., engineering, inspection, or testing) provided in the Government's interest but not contractually required.

(d) When the surveying activity possesses information that supports a recommendation of complete award without an on-site survey and no special areas for investigation have been requested, the surveying activity may provide a short-form preaward survey report. The short-form report shall consist solely of the Preaward Survey of Prospective Contractor (General), SF 1403. Sections III and IV of this form shall be completed and block 21 shall be checked to show that the report is a short-form preaward report.

9.107 Surveys of blind and other severely handicapped workshops.

(a) The Committee for Purchase from the Blind and Other Severely Handicapped (Committee), as authorized by 41 U.S.C. 46-48c, determines what supplies and services Federal agencies are required to purchase from workshops for the blind and other severely handicapped (see Subpart 8.7). The Committee is required to find a workshop capable of producing the supplies or providing the services before the workshop can be designated as a mandatory source under the Committee's program. The Committee may request a contracting office to assist in assessing the capabilities of a workshop.

(b) The contracting office, upon request from the Committee, shall request a capability survey from the activity responsible for performing preaward surveys, or notify the Committee that the workshop is capable, with supporting rationale, and that the survey is waived. The capability survey will focus on the technical and production capabilities and applicable preaward survey elements to furnish specific supplies or services being considered for addition to the Procurement List.

(c) The contracting office shall use the Standard Form 1403 to request a capability survey of blind and other severely handicapped organizations.

(d) The contracting office shall furnish a copy of the completed survey, or notice that the workshop is capable and the survey is waived, to the Executive Director, Committee for Purchase from the Blind and Other Severely Handicapped.

SUBPART 9.2—QUALIFICATIONS REQUIREMENTS

9.200 Scope of subpart.

This subpart implements 10 U.S.C. 2319 and 41 U.S.C. 253c and prescribes policies and procedures regarding qualification requirements and the acquisitions that are subject to such requirements.

9.201 Definitions.

"Procuring activity," as used in this part or subpart, means a component of an executive agency having a significant acquisition function and designated as such by the head of the agency. Unless agency regulations specify otherwise, the term "procuring activity" shall be synonymous with "contracting activity" as defined in Subpart 2.1.

"Qualification requirement" means a Government requirement for testing or other quality assurance demon-

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stration that must be completed before award of a contract.

"Qualified bidders list (QBL)" means a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied all applicable qualification requirements.

"Qualified manufacturers list (QML)" means a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product.

"Qualified products list (QPL)" means a list of products which have been examined, tested, and have satisfied all applicable qualification requirements.

9.202 Policy.

(a)(1) The head of the agency or designee shall, before establishing a qualification requirement, prepare a written justification—

(i) Stating the necessity for establishing the qualification requirement and specifying why the qualification requirement must be demonstrated before contract award;

(ii) Estimating the likely costs for testing and evaluation which will be incurred by the potential offeror to become qualified; and

(iii) Specifying all requirements that a potential offeror (or its product) must satisfy in order to become qualified. Only those requirements which are the least restrictive to meet the purposes necessitating the establishment of the qualification requirements shall be specified.

(2) Upon request to the contracting activity, potential offerors shall be provided—

(i) All requirements that they or their products must satisfy to become qualified; and

(ii) At their expense (but see 9.204(a)(2) with regard to small businesses), a prompt opportunity to demonstrate their abilities to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned, or of another agency obtained through interagency agreements or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency).

(3) If the services in (a)(2)(ii) above are provided by contract, the contractors selected to provide testing and evaluation services shall be—

(i) Those that are not expected to benefit from an absence of additional qualified sources; and

(ii) Required by their contracts to adhere to any restriction on technical data asserted by the potential offeror seeking qualification.

(4) A potential offeror seeking qualification shall be promptly informed as to whether qualification is attained and, in the event it is not, promptly furnished specific reasons why qualification was not attained.

(b) When justified under the circumstances, the agency activity responsible for establishing a qualification requirement shall submit to the competition advocate for the procuring activity responsible for purchasing the item subject to the qualification requirement, a determination that it is unreasonable to specify the standards for qualification which a prospective offeror (or its product) must satisfy. After considering any comments of the competition advocate reviewing the determination, the head of the procuring activity may waive the requirements of 9.202(a)(1)(ii) through (4) above for up to 2 years with respect to the item subject to the qualification requirement. A copy of the waiver shall be furnished to the head of the agency or other official responsible for actions under 9.202(a)(1). The waiver authority provided in this paragraph does not apply with respect to qualification requirements contained in a QPL, QML, or QBL.

(c) If a potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror (or its product) meets the standards established for qualification or can meet them before the date specified for award of the contract, a potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror—

(1) Is not on a QPL, QML, or QBL maintained by the Department of Defense (DOD) or the National Aeronautics and Space Administration (NASA); or

(2) Has not been identified as meeting a qualification requirement established after October 19, 1984, by DOD or NASA; or

(3) Has not been identified as meeting a qualification requirement established by a civilian agency (not including NASA).

(d) The procedures in Subpart 19.6 for referring matters to the Small Business Administration are not mandatory on the contracting officer when the basis for a referral would involve a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(e) The contracting officer need not delay a proposed award in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification. In addition, when approved by the head of an agency or designee, a procurement need not be delayed in order to comply with 9.202(a).

(f) Within 7 years following enforcement of a QPL, QML, or QBL by DOD or NASA, or within 7 years after any qualification requirement was originally established by a civilian agency other than NASA, the qualification requirement shall be examined and revalidated in accordance with the requirements of 9.202(a). For DOD and NASA, qualification requirements other than QPL's, QML's and QBL's shall be examined and revalidated within 7 years after establishment of the requirement under 9.202(a). Any periods for which a waiver under 9.202(b) is in effect shall be excluded in computing the 7 years within which review and revalidation must occur.

9.203 QPL's, QML's, and QBL's.

(a) Qualification and listing in a QPL, QML, or QBL is the process by which products are obtained from manufacturers or distributors, examined and tested for compliance with specification requirements, or manufacturers or potential offerors, are provided an opportunity to demonstrate their abilities to meet the standards specified for qualification. The names of successful products, manufacturers, or potential offerors are included on lists evidencing their status. Generally, qualification is performed in advance and independently of any specific acquisition action. After qualification, the products, manufacturers, or potential offerors are included in a Federal or Military QPL, QML, or QBL. (See 9.202(a)(2) with regard to any product, manufacturer, or potential offeror not yet included on an applicable list.)

(b) Specifications requiring a qualified product are included in the following publications:

(1) GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, FPMR 101-29.1.

(2) Department of Defense Index of Specifications and Standards.

(c) Instructions concerning qualification procedures are included in the following publications:

(1) Federal Standardization Handbook, FPMR 101-29, Chapter IV.

(2) Defense Standardization Manual 4120.3-M, Chapter IV, as amended by Military Standards 961 and 962.

(d) The publications listed in paragraphs (b) and (c) above are sold to the public by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. Civil agencies may obtain the publications from the General Services Administration, Specifications Section (WFSIS), Washington, DC 20407. Defense agencies may obtain the publications from the Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120.

9.204 Responsibilities for establishment of a qualification requirement.

The responsibilities of agency activities that establish qualification requirements include the following:

(a) Arranging publicity for the qualification requirements. If active competition on anticipated future qualification requirements is likely to be fewer than two manufacturers or the products of two manufacturers, the activity responsible for establishment of the qualification requirements shall—

(1) Periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification unless the contracting officer determines that such publication would compromise the national security.

(2) Bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement. However, such costs may be borne only if it is determined in accordance with agency procedures that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time, considering the duration and dollar value of anticipated future requirements. A prospective contractor requesting the United States to bear testing and evaluation costs must certify as to its status as a small business concern under Section 3 of the Small Business Act in order to receive further consideration.

(b) Qualifying products that meet specification requirements.

(c) Listing manufacturers and suppliers whose products are qualified in accordance with agency procedures.

(d) Furnishing QPL's, QML's, or QBL's or the qualification requirements themselves to prospective offerors and the public upon request (see 9.202(a)(2)(i) above).

(e) Clarifying, as necessary, qualification requirements.

(f) In appropriate cases, when requested by the contracting officer, providing concurrence in a decision not to enforce a qualification requirement for a solicitation.

(g) Withdrawing or omitting qualification of a listed product, manufacturer or offeror, as necessary.

(h) Advising persons furnished any list of products, manufacturers or offerors meeting a qualification requirement and suppliers whose products are on any such list that—

(1) The list does not constitute endorsement of the product, manufacturer, or other source by the Government;

(2) The products or sources listed have been qualified under the latest applicable specification;

(3) The list may be amended without notice;

(4) The listing of a product or source does not release the supplier from compliance with the specification; and

(5) Use of the list for advertising or publicity is permitted. However, it must not be stated or implied that a particular product or source is the only product or source of that type qualified, or that the Government in any way recommends or endorses the products or the sources listed.

(i) Reexamining a qualified product or manufacturer when—

(1) The manufacturer has modified its product, or changed the material or the processing sufficiently so that the validity of previous qualification is questionable;

(2) The requirements in the specification have been amended or revised sufficiently to affect the character of the product; or

(3) It is otherwise necessary to determine that the quality of the product is maintained in conformance with the specification.

9.205 Opportunity for qualification before award.

(a) If an agency determines that a qualification requirement is necessary, the agency activity responsible for establishing the requirement shall urge manufacturers and other potential sources to demonstrate their ability to meet the standards specified for qualification and, when possible, give sufficient time to arrange for qualification before award. The responsible agency activity shall, before establishing any qualification requirement, furnish notice to the U.S. Department of Commerce, Office of Field Operations, P.O. Box 5999, Chicago, Illinois 60680, for synopsis in the Commerce Business Daily. The notice shall include—

(1) Intent to establish a qualification requirement;

(2) The specification number and name of the product;

(3) The name and address of the activity to which a request for the information and opportunity described in 9.202(a)(2) should be submitted;

(4) The anticipated date that the agency will begin awarding contracts subject to the qualification requirement;

(5) A precautionary notice that when a product is submitted for qualification testing, the applicant must furnish any specific information that may be requested of the manufacturer before testing will begin; and

(6) The approximate time period following submission of a product for qualification testing within which the applicant will be notified whether the product passed or failed the qualification testing (see 9.202(a)(4)).

(b) The activity responsible for establishing a qualification requirement shall keep any list maintained of those already qualified open for inclusion of additional products, manufacturers, or other potential sources, including eligible products from designated countries under the terms of the International Agreement on Government Procurement (see Subpart 25.4).

9.206 Acquisitions subject to qualification requirements.

9.206-1 General.

(a) Agencies may not enforce any QPL, QML, or QBL without first complying with the requirements of 9.202(a). However, qualification requirements themselves, whether or not previously embodied in a in a QPL, QML, or QBL, may be enforced without regard to 9.202(a) if they are in either of the following categories:

(1) Any qualification requirement established by statute prior to October 30, 1984, for civilian agencies (not including NASA); or

(2) Any qualification requirement established by statute or administrative action prior to October 19, 1984, for DOD or NASA. Qualification requirements established after the above dates must comply with 9.202(a) to be enforceable.

(b) Except when the agency head or designee determines that an emergency exists, whenever an agency elects, whether before or after award, not to enforce a qualification requirement which it established, the requirement may not thereafter be enforced unless the agency complies with 9.202(a).

(c) If a qualification requirement applies, the contracting officer need consider only those offers identified as meeting the requirement or included on the applicable QPL, QML, or QBL, unless an offeror can satisfactorily demonstrate to the contracting officer that it or its product or its subcontractor or its product can meet the standards established for qualification before the date specified for award.

(d) If a product subject to a qualification requirement is to be acquired as a component of an end item, the contracting officer must ensure that all such components and their qualification requirements are properly identified in the solicitation since the product or source must meet the standards specified for qualification before award.

(e) In acquisitions subject to qualification requirements, the contracting officer shall take the following steps:

(1) Use presolicitation notices in appropriate cases to advise potential suppliers before issuing solicitations involving qualification requirements. The notices shall identify the specification containing the qualification requirement and establish an allowable time period, consistent with delivery requirements, for prospective offerors to demonstrate their abilities to meet the standards specified for qualification. The notice shall be publicized in accordance with 5.204. Whether or not a presolicitation notice is used, the general synopsizing requirements of Subpart 5.2 apply.

(2) Distribute solicitations to prospective contractors whether or not they have been identified as meeting applicable qualification requirements.

(3) When appropriate, request in accordance with agency procedures that a qualification requirement not be enforced in a particular acquisition and, if granted, so specify in the solicitation (see 9.206-1(b)).

(4) Forward requests from potential suppliers for information on a qualification requirement to the agency activity responsible for establishing the requirement.

(5) Allow the maximum time, consistent with delivery requirements, between issuing the solicitation and the contract award. As a minimum, contracting officers

shall comply with the time frames specified in 5.203 when applicable.

9.206-2 Contract clause.

The contracting officer shall insert the clause at 52.209-1, Qualification Requirements, in solicitations and contracts when the acquisition is subject to a qualification requirement.

9.206-3 Competition.

(a) *Presolicitation.* If a qualification requirement applies to an acquisition, the contracting officer shall review the applicable QPL, QML, or QBL or other identification of those sources which have met the requirement before issuing a solicitation to ascertain whether the number of sources is adequate for competition.

(See 9.204(a) for duties of the agency activity responsible for establishment of the qualification requirement.) If the number of sources is inadequate, the contracting officer shall request the agency activity which established the requirement to—

(1) Indicate the anticipated date on which any sources presently undergoing evaluation will have demonstrated their abilities to meet the qualification requirement so that the solicitation could be rescheduled to allow as many additional sources as possible to qualify; or

(2) Indicate whether a means other than the qualification requirement is feasible for testing or demonstrating quality assurance.

(b) *Postsolicitation.* The contracting officer shall submit to the agency activity which established the qualification requirement the names and addresses of concerns which requested copies of the solicitation but are not included on the applicable QPL, QML, or QBL or identified as meeting the qualification requirement. The activity will then assist interested concerns in meeting the standards specified for qualification (see 9.202(a)(2) and (4)).

9.207 Changes in status regarding qualification requirements.

(a) The contracting officer shall promptly report to the agency activity which established the qualification requirement any conditions which may merit removal or omission from a QPL, QML, or QBL or affect whether a source should continue to be otherwise identified as meeting the requirement. These conditions exist when—

(1) Products or services are submitted for inspection or acceptance that do not meet the qualification requirement;

(2) Products or services were previously rejected and the defects were not corrected when submitted for inspection or acceptance;

(3) A supplier fails to request reevaluation following change of location or ownership of the plant where the product which met the qualification requirement was manufactured (see the clause at 52.209-1, Qualification Requirements);

(4) A manufacturer of a product which met the qualification requirement has discontinued manufacture of the product;

(5) A source requests removal from a QPL, QML, or QBL;

(6) A condition of meeting the qualification requirement was violated; e.g., advertising or publicity contrary to 9.204(b)(5);

(7) A revised specification imposes a new qualification requirement;

(8) Manufacturing or design changes have been incorporated in the qualification requirement;

(9) The source is on the list of Parties Excluded from Procurement Programs (see Subpart 9.4); or

(10) Performance of a contract subject to a qualification requirement is otherwise unsatisfactory.

(b) After considering any of the above or other conditions reasonably related to whether a product or source continues to meet the standards specified for qualification, an agency may take appropriate action without advance notification.

The agency shall, however, promptly notify the affected parties if a product or source is removed from a QPL, QML, or QBL, or will no longer be identified as meeting the standards specified for qualification. This notice shall contain specific information why the product or source no longer meets the qualification requirement.

SUBPART 9.3—FIRST ARTICLE TESTING AND APPROVAL

9.301 Definitions.

"Approval," as used in this subpart, means the contracting officer's written notification to the contractor accepting the test results of the first article.

"First article," as used in this subpart, means preproduction models, initial production samples, test samples, first lots, pilot lots, and pilot models.

"First article testing" means testing and evaluating the first article for conformance with specified contract requirements before or in the initial stage of production.

9.302 General.

First article testing and approval (hereafter referred to as testing and approval) ensures that the contractor can furnish a product that conforms to all contract requirements for acceptance. Before requiring testing and approval, the contracting officer shall consider the—

(a) Impact on cost or time of delivery;

(b) Risk to the Government of foregoing such test; and

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Wash. Post 5/24/94 Appendix 4

Pilot Project on Procurement Seeks To Take Guesswork From Contracts

By Stephen Barr
Washington Post Staff Writer

The Office of Management and Budget yesterday announced a new pilot project designed to ease some of Washington's chronic procurement problems, such as cost overruns and lack of competition on large contracts.

The government spends about $105 billion each year on "contracting out," buying services that range from grass-cutting and painting to highly complex scientific research and analysis.

The announcement by OMB Director Leon E. Panetta said the pilot project would encourage federal agencies government-wide to refashion some of their existing service contracts to reflect performance-based standards. They would include price, level of competition, number of contract audits and length of the procurement cycle.

"This pilot project will help to streamline the procurement process and create a better work environment between the government and service contractors," Panetta said.

For the experiment, agencies would convert contracts that offer ways to measure before-and-after results, and move from cost-reimbursement contracts to fixed-priced contracts. Agencies also would break up large "umbrella," or multipurpose contracts that typically include a variety of routine services, such as guards and secretaries.

"I think a lot of people throughout government would agree with the observation that very frequently, in government and in service contracting, we don't do a good enough job of defining what we want out of the contractors, what performance we want," said Steven Kelman, the administrator of OMB's Office of Federal Procurement Policy.

Earlier this year, a survey ordered by Panetta found that the "statements of work" which describe the tasks or services to be purchased are often so imprecise that vendors are unable to determine agency requirements. Poor statements of work can reduce the number of bidders, limiting competition, and make it difficult to assess a contractor's performance.

Kelman, noting that "it's hard to write a good statement of what you want," said some procurement officials developed statements of work, then used them repeatedly without taking into account technological changes or lessons learned from management experiences.

The pilot project, he said, will "tighten up the system in the sense of making it more clear, up front, what the performance criteria is and what we want from contractors."

By using performance-based standards, Kelman said, the government should be able to move to fixed-price contracts, perform fewer audits and save around 20 percent on contract costs. An "unusually dramatic" example— savings of 43 percent— was achieved at the Treasury Department when it took a cost-based contract for training and coverted it to fixed price, Kelman said.

Kelman said that the government-wide pilot project builds on work done by the Energy Department's Contract Reform Team, led by Deputy Energy Secretary William H. White, which seeks to improve contract management and administration. At White's direction, the department is seeking to break habits that favored large contractors, giving them repeated contract extensions.

White's goal is to increase competition by breaking large contracts into discrete tasks that can be better performed by private firms other than the prime management contractor.

Kelman said that the pilot program, in encouraging agencies to break up large umbrella service contracts, should make the problem of too-little competition "somewhat better."

Some agencies write into contracts the phrase "knowledge of the agency's requirements" as a proxy "for not using past performance and for not specifying what performance they expect from the contractor," he said.

Kelman wants agencies to put less weight on the traditional phrase and do a better job of defining the scope of work to be performed. But, he cautioned, such a shift should not be viewed as a "panacea" that will automatically increase competition.

Bert M. Concklin, president of the Professional Services Council, a nonprofit trade group, called the OMB initiative "very positive" and said contractors have begun "constructive and candid discussions" with Kelman on how to design the pilots.

Concklin said the OMB project complements procurement legislation pending in the Senate and House. "The stuff in the Congress is strategic and this is very important tactical stuff," Concklin said. "What it's all about is writing much more precise . . . mutually understood statements of work. That's what this will do if well done."

"Very frequently, in government and in service contracting, we don't do a good enough job of defining what we want out of the contractors ..."

— Steven Kelman, OMB's Office of Federal Procurement Policy

Appendix 5

Performance-Based Contracting Background

By way of brief background, on April 9, 1991, the Office of Federal Procurement Policy issued a policy letter establishing USG policy favoring the use of PBC. On May 14, 1991, USAID issued a CIB (91-18) enclosing the policy letter and directing USAID Contracting Officers to use their best efforts to ensure that scopes of work for USAID procurements are performance-based and that formal quality assurance standards are included in the contract. On July 30, 1992, FAR revisions were proposed to amplify and make mandatory PBC for services acquisitions (unless a justification for not using PBC were done).

While those FAR revisions have not yet been made final, parts of the new proposed FAR Subpart, 37.2, on PBC merit quotation here for their statements concerning what PBC is about. Proposed FAR 37.201 provides:

> Performance-based contracting methods provide the means to ensure that required performance quality levels are achieved and that payment is made only for services which meet contract standards. They --
>
> (a) Describe the requirements in terms of results required rather than the method of performance of the work . . .;
> (b) Use formal measurable (i.e., in terms of quality, timeliness, quantity, etc.) performance standards and quality assurance surveillance plans . . .;
> (c) Specify procedures for reductions to the contract price when services are not performed, or do not meet contract requirements . . .;
> (d) Include performance incentives based on quality . . .; and
> (e) Use acquisition strategies that provide for awards of contracts which are most advantageous to the Government and best promote performance-based contracting . . . .

Proposed FAR 37.202-1 provides:

> Statements of work shall define the requirements in clear, concise language identifying specific tasks to be accomplished. . . . When preparing statements of work, agencies shall, to the maximum extent practical . . . --
> (a) Describe the work in terms of "what" is to be the required output rather than either "how" the work is to be accomplished or the number of hours to be provided;
> (b) Enable assessment of work performance against measurable performance standards . . .;
> (c) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost effective methods of performing the work;

(d) Consider issuing draft statements of work to assist in refining statements of work . . . and achieve the objectives of acquisition streamlining . . .; and

(e) Avoid combining requirements into a single acquisition which is too broad for the agency or a prospective contractor to effectively manage.

(emphasis added) Under proposed FAR 37.202-3, agencies' prescriptions of levels of effort (and personnel qualifications) "should be avoided whenever possible . . . ."